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ABSTRACT

This report to the President recommends the organizational restructuring and redefining of the responsibilities of the following regulatory agencies: Interstate Commerce Commission, Civil Aeronautics Board, Federal Maritime Commission, Securities and Exchange Commission, and the Federal Power Commission. Prepared by the President's Advisory Council on Executive Organization, the report emphasizes that the national economy involves an increasingly interrelated set of activities demanding a great degree of coordination, consistency of policy, and cooperation between the public and private sector of our economy. (CP)

A NEW REGULATORY FRAMEWORK

Report On Selected Independent Regulatory Agencies

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The President's
Advisory Council On
Executive Organization

January 1971

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EXECUTIVE OFFICE OF THE PRESIDENT

PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION
Washington, D.C. 20506

January 30, 1971.

DEAR MR. PRESIDENT:

The President's Advisory Council on Executive Organization herewith submits its report on the independent regulatory agencies.

Our recommendations concerning seven regulatory agencies—the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Maritime Commission, the Securities and Exchange Commission, the Federal Power Commission, the Federal Trade Commission, and the Federal Communications Commission—aim to establish a new framework within which the agencies might be structured now and for the future.

As we make these recommendations for organizational change, we recognize that consideration is being given to questions of the amount and kind of regulation needed today. Although the regulatory laws may need revision, changes in regulatory structure can and indeed should be implemented in advance of changes in the substantive laws. The existing structure, because of its inherent and perhaps unavoidable deficiencies, cannot be expected to accommodate these revised mandates which may require that regulation reflect the pace of change in the regulated industries, the interdependence of elements of the economy, and the public interest. A more effective and objective regulatory process, better integrated with other processes of government, requires a new organizational framework for regulation.

We have observed that, as economic regulation has evolved largely on an as-needed basis, it has not developed a breadth of perspective necessary to encompass the needs of the public and the regulated industries. As

each commission was created, it undoubtedly served the needs as seen at that time. The question we asked was: Are the statutorily expressed intentions of Congress and the changing demands of the national economy and of the public best served by the present structure of regulatory administration? We concluded that they are not. Changes in public requirements and characteristics of the regulated industries compel the establishment of a new structural framework to better serve today. For the future, effective regulation depends upon recognizing that the national economy involves an increasingly interrelated set of activities, demanding a greater degree of coordination, consistency of policy, and cooperation between the public and private sectors of the economy.

We have not prescribed all the organizational details of the proposed restructured agencies. Internal agency organization should reflect the participation and contribution of others intimately familiar with the operating details of each agency, the changes in enabling statutes which may be enacted concurrent with changes in structure, and, in the final analysis, the organizational viewpoint of each agency's administrative head.

In reaching our conclusions we relied heavily on the opinions of participants in, and observers of the regulatory process, together with our own analysis of the history, current needs and current structure of regulation. Our analysis also involved detailed consideration of existing regulatory statutes, previous studies, and expert commentary.

Although our recommendations are presented together, each should be viewed on its own merits. We feel that the composite program offers the best opportunity for improved regulation, but we also believe that each proposal, in and of itself, will serve to benefit the regulatory process. Thus, for each recommendation, we separately set forth the underlying considerations and rationale pertaining to our conclusions. Due attention should be given to differences in the responsibilities of the regulatory agencies in evaluating these proposals. For while we have emphasized similarity in our findings, others may, in noting differences, arrive at divergent conclusions and, as a consequence, different proposals for change.

In commending these proposals to you, we are mindful of the sweeping change in industry and governmental practice implicit in them. We are also well aware of their economic implications. We believe, therefore, that these recommendations should be made public in order to generate broad discussion of the Federal role in economic regulation.

In the public debate which publication of these proposals will generate, views which we have not heard and problems which we have not un-

covered or defined completely may emerge. Ideas for improving not only regulatory structure, but regulatory statutes and administrative procedures as well are likely to be offered. We believe you should have the benefit of such public discussion in order to aid you in determining which, if any, proposals to make to the Congress.

Respectfully submitted,

ROY L. ASH, *Chairman.*

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*To avoid any possible conflict of interest, Mr. Ash did not participate in the Council's discussions, deliberations, or recommendations with respect to the Federal Trade Commission; Mr. Kappel did not participate in discussions, deliberations, or recommendations with respect to the Federal Communications Commission; and Mr. Thayer did not participate in discussions, deliberations, or recommendations with respect to the Federal Trade Commission and the Federal Communications Commission.

Dr. Baker did not participate in any facet of this study.

Mr. Kappel's dissenting statement with respect to the Council's recommendations contained in Part II follows the "Findings and Recommendations."

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Findings
and
Recommendations

Findings and Recommendations

Major and fundamental change pervades each of the areas of economic enterprise under regulation by the independent regulatory commissions.

- In transportation, increasing interaction between th various modes reflects a persistent striving for greater efficiency in the movement of goods and people;
- In trade, new and probably enduring levels of public and producer attention are being given to the quality of goods and services, and to the operation of the marketplace;
- In securities, even as the structure of the industry itself and the relationship between Government and industry are experiencing major changes, a well-established trend toward institutional investment and new methods of financing are significantly altering the characteristics of securities trading;
- In power, where industry structure is also undergoing change, supplies of electrical energy and natural gas have not consistently kept pace with increasing demands in certain areas, and new technologies have yet to take up the slack;
- In communications, burgeoning technology has created new avenues for service and new products which together complicate the task of regulation and blur distinctions between the various forms of communications.

The independent regulatory commissions play a critical role in balancing the changing demands of the Nation for the goods and services of regulated industries and the related need for financially sound and effectively managed industries in the regulated sectors of our economy. Unfortunately, obsolete organizational forms limit the effectiveness of these commissions in responding to economic, technological, structural, and social change. Inappropriate regulatory structures and cumbersome procedures impose burdens that impede good public service, sound financial and operational planning, and adjustment to changes in growing industries—contrary to the purposes of regulation.

Our proposals for change in the organizational forms of several independent regulatory commissions are directed at improving agency effectiveness, while assuring fairness to those involved in or affected by the regulatory process.

FINDINGS

The regulatory commissions are not sufficiently accountable for their actions to either the Congress or the President because of the degree of their independence and remoteness in practice from those constitutional branches of government. Regulatory activities, therefore, are not adequately supported and are not effectively coordinated with national policy goals.

Inherent deficiencies in the commission form of organization prevent the commissions from responding effectively to changes in industry structure, technology, economic trends, and public needs.

Deficiencies in the performance of the regulatory commissions are partly due to the difficulty of attracting highly qualified commissioners and retaining executive staff. Even able administrators have difficulty in serving as coequals on collegial commissions.

- While there are notable exceptions, it is difficult to attract to regulatory positions men of skill in administration and breadth of perspective largely because of the procedures and traditions associated with appointment to the regulatory commissions.
- Given these traditions and the shared responsibility of the collegial form, it is not likely that commission positions will generate greater interest in the future.

Certain judicial activities of the commissions conflict with their policy-making responsibilities and generate an organizational environment inimical to regulatory efficiency and constructive response to industry and the public.

- Many commissions engage excessively in case-by-case adjudication as a basis for policy formulation rather than using less formal procedures such as exchanges of written or oral information, informal regulatory guidance, or rulemaking.
- The judicial cast of agency review proceedings places too great an emphasis on legal perspectives to the detriment of economic, financial, technical, and social perspectives. One result is a high level of legal skill among agency professionals and commissioners, but generally insufficient capability in other disciplines.
- The judicial cast of agency review proceedings delays final administrative determinations and invites dilatory appeals.
- Overjudicialization encumbers the time and energies of commissioners and staff, causes undue case backlogs, imposes high costs upon litigants, prevents anticipatory action through rulemaking, deters informal settlements, and precludes coordination of agency policy and priorities with those of the executive branch.

Certain functional responsibilities are inappropriately distributed among the various commissions.

- Responsibility for regulation of transportation is distributed among the ICC, CAB, and FMC, impeding formulation of broader regulatory policy covering the several transportation modes and coordination with the Department of Transportation, and thus forestalling consistency in national transportation policy.
- Responsibility for promotion of transportation, vested in some regulatory commissions, conflicts with the regulatory activity of those agencies.
- Combination of antitrust enforcement and consumer protection in the FTC deprives that agency of a central purpose, fostering an uncertainty of emphasis as between its functions, inordinate delay, and preoccupation with routine matters.
- Regulation of public utility holding companies by the SEC is no longer best performed by that agency. Regulatory expertise regarding public utility holding companies rests with the FPC.

RECOMMENDATIONS

To assure coordination of regulatory matters with national policy goals, to improve the management efficiency of regulatory functions, to improve accountability to the Congress and the executive branch, and to increase the probability of superior leadership for regulatory activities, the transportation, power, securities, and consumer protection regulatory functions should be administered by single administrators, appointed by

the President. These functions should be performed by agencies respectively designated: Transportation Regulatory Agency, Federal Power Agency, Securities and Exchange Agency, and Federal Trade Practices Agency.

- The authority and responsibility attending the single administrator form should enable the agencies to attract and retain the most highly qualified administrators and executive staffs.
- Unambiguous placement of authority for agency policy and operations in a single administrator should increase accountability to both the Congress and the President.
- Agency work should be expedited by utilizing more effective administrative techniques made possible by one-man management of agency activities.

The communications regulatory function and the antitrust enforcement function should, as now, be carried out by multimember bodies for reasons supervening the advantages of a single administrator. The FCC should be reduced in size from seven to five members, to serve 5-year terms.

To prevent the overjudicialization of agency procedures and attitudes and to assure comprehensive and anticipatory policymaking, internal agency review of proceedings should be limited in time and focused primarily on the consistency of the decision with agency policy. Appeals from final agency decisions should be heard by an Administrative Court of the United States.

- A 30-day period should be allowed after a hearing examiner's decision for review by the single administrator. The administrator should have the power to modify or remand an examiner's decisions. The limited time and scope of policy review by agency administrators should help make initial decisions of agency examiners, in many cases, final determinations of the agency.
- The Administrative Court should review appeals by an aggrieved party from final agency determinations of the transportation, securities and power agencies. Decisions of the antitrust, trade practices, and communications agencies would be reviewed in the Federal courts as they are today.
- The court should consist of as many as 15 judges, appointed by the President and confirmed by the Senate for terms sufficiently long as to attract men of quality. We suggest 15-year staggered terms, with judges sitting in three-man panels for each case reviewed by the court.

Certain functional responsibilities of the agencies should be realigned.

- To reflect the increasing interdependence of the structure, economics, and technology of the transportation modes, regulatory responsibilities of the ICC, CAB, and the FMC should be combined within a new Transportation Regulatory Agency.
- To correct the conflict inherent in performing regulatory and promotional functions in the same agency, the promotional subsidy-granting activities of the CAB should be transferred to the Department of Transportation.
- To assure that each of its missions is more effectively performed, the FTC's consumer protection responsibilities should be vested in a new Federal Trade Practices Agency and its antitrust enforcement responsibilities should be vested in a new Federal Antitrust Board. The Board should consist of a chairman and two economist members, each appointed by the President with the consent of the Senate.
- To provide an organizational placement which better reflects current realities, the regulatory responsibilities of the SEC under the Public Utility Holding Company Act should be transferred to the Federal Power Agency.

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DISSENTING STATEMENT OF FREDERICK R. KAPPEL

The Council made its recommendations to the President in a brief and to the point preliminary report on July 10, 1970. It included a dissent on my part consistent with the content of that report.

This more complete report contains the same specific recommendations and my dissent concerning them is unchanged and quoted herein.

This report elaborates considerably on the earlier report in its reasoning and in its references, quotes, and documentation. It does this by the inclusion of views and writings from numerous sources. These include legal, academic, government committee views, and writings from individuals involved as regulators past and present. There were over 200 interviews made by staff as noted in the report.

In connection with the references, interviews and other material researched I must point out that there are almost no references or views from the regulated entities. To this extent I believe any one who accepts this report on its face value must recognize that it is almost totally lacking in this very important respect. If constructive action results from this report and the efforts behind it (and I sincerely hope that it will), it will require, in my opinion, that this added point of view be sought and considered in a major way. Any useful progress will require it.

Since this report is hopefully the beginning of an effort to bring to bear all qualified viewpoints toward better regulatory results, it must be the aim that such regulation meet the test of not only good, safe, ample

goods and services fairly priced to the public, but the organizational structure and the level of competence of the regulators themselves must be such that they will soundly recognize the problems of the regulated entities and work with the realization that the producers and businesses involved must be allowed freedom to manage and have ample leeway in operations and rate of returns to produce the high quality and ample service results that are vital to the whole country. This is a serious deficiency in past performance.

The ensuing developments should include careful examination of the recommendations of this Council, agency by agency, before adopting these structural recommendations as I note in the following quoted dissent previously referred to:

"I do not share the judgments of my associates in recommending a single administrator and a separate administrative court. These proposals reflect their belief that they will bring about a greater capability of administration and improved decision processes. There is no certainty that these proposals will lead to more effective administration. The economic and technological aspects of transportation and power regulation, for example, are more complex than other nonservice industries studied. The problems raised in the regulation of these industries cannot be resolved entirely in the atmosphere of either a hearing officer or an administrative court. I fear that this will be the result of the changes proposed by my colleagues.

"I agree, however, along with my colleagues that we should emphasize the need to encourage men of exceptional ability to seek and accept appointments to these vital administrative posts as a prime objective of our recommendations. But, I would suggest that more careful attention to the selection of commissioners and other key personnel is as likely to improve the administrative process as is the single administrator and the administrative court.

"In my opinion, it would be more appropriate to implement these proposals in one administrative agency. The FTC would be my selection. These innovations may then be studied carefully before any further attempt is made to implement them elsewhere."

Part I

Overview

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Overview

The independent regulatory commissions, now mature institutions of the Federal Government, are characterized by rigidity in their process and in their patterns of relationship with Congress and the executive branch, the regulated industries, and the public. They lack the adaptive force which might regenerate or redefine their roles in helping shape the American economy. Both rigidity and lack of adaptability impede regulatory effectiveness at the very time when persistent trends and new directions in the economy demand flexibility and imagination to carry out regulatory objectives and to formulate action in the interest of the public, including the regulated segments of the private sector.

REGULATION AND GOVERNMENTAL STRUCTURE

The ICC, CAB, FMC, FTC, SEC, FPC, and FCC, established by Congress in the years since 1887, have long been considered an anomaly in government structure.[1] They are institutions housed in the executive branch, carrying out legislative functions, and behaving like courts. In the past quarter century, the growth of the regulated industries and the pace of the national economy have largely outdistanced the ability of the commissions to cope constructively with regulatory problems.

To have practical meaning, the commissions' charge to regulate in the interest of the public must include regard for economic, technological, and social developments, as well as the capability of the regulated industries to provide good public service.

Inadequacies in regulatory structure have adversely affected the implementation of Congressional mandates, the management of executive

branch functions, the interests of the public generally, and the ability of the regulated industries to operate their businesses profitably or to plan future actions with reasonable assurance of what regulatory policy will be.

The history of the regulatory commissions reflects an attempt to respond practically to national needs with institutions outside the three constitutional branches of government. Congress initially undertook to perform some regulatory responsibilities, but later conferred these responsibilities on independent commissions, a form that it believed would provide fairness and expertise, without delay or partisan influence. The commissions, however, soon became part of a highly specialized, independent "fourth branch" of the Federal Government. Today, they are not sufficiently accountable to either Congress or the executive branch. Perhaps because of this, they have become less effective in balancing the needs of the public with those of the industries they regulate consistent with Congressional intent and executive policy.

REGULATORY ACCOUNTABILITY

More than 30 years ago, the President's Committee on Administrative Management highlighted the lack of accountability of independent regulatory commissions:

> They constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers * * * . The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities.[2]

The point has been made many times since, but the scope of the problem has changed little, if at all, over the years. The independent commissions persist more from inertia than from an analysis of how regulatory bodies should properly function within the context of a comprehensive political and economic system.

Congress has conceived of these commissions as independent of executive branch control, but in fact the commissions are almost as independent of Congress itself. Apart from appropriations approval, periodic program review, and the intermittent interest of one or several of its members, Congress does not exercise the degree of oversight with respect to regulatory commissions that it does for executive departments and other agencies of the executive branch. Congress has sought to preserve the independence of the regulatory commissions, even as their activities increasingly affect the implementation of national policy. The executive branch, responsible for carrying out national policy, has been reluctant to support reforms needed to integrate regulatory activities with executive programs

because the President does not have sufficient responsibility for commission direction.

Yet congressional and executive attention to regulatory needs is required more today than ever in the past because of the increasing interdependence of national economic policies which emerge from budget and fiscal action, economic regulation, and industry promotion by government. Proponents of the commission form tend to ignore that interdependence.[3] In doing so they perpetuate processes and relationships which may frustrate national policy and sound economic growth.

Independence, and the resulting absence of regulatory accountability, has transferred to a generally shielded arena those questions which should be settled in a more open forum. The public—the intended beneficiary of regulation—has found it difficult to understand the issues and lacks a practical mechanism through which to communicate its views.

All this, together with significant impediments to regulatory performance inherent in the commission form itself, has led the commissions to become less responsive to economic and social trends and changes in industry structure.

Most studies and commentary relating to reform of the regulatory commissions over the years emphasize their separateness from an integrated governmental structure.[4] These studies, and subsequent attempts to implement proposals stemming from them, have concentrated on reordering personnel, procedures, or functions to improve commission performance. Such efforts are commendable, but internal revision and redefinition are not enough. The regulatory apparatus requires a fundamental restructuring to enhance overall effectiveness and responsibility.

Accountability to Congress

Congress' powers under article II of the Constitution to regulate interstate and foreign commerce is the primary basis for regulatory controls. Through legislation, Congress has vested in regulatory commissions the powers necessary to carry out broad statutory mandates. But congressional statements of policy are understandably general, leaving to the commissions the task of making specific policy to implement those objectives. One result is that the commissions, in the course of time, have developed policies affecting the economy without sufficient guidance or check by Congress.[5] This condition is aggravated in the view of some commentators by the commission form of organization which makes it hard to pinpoint those within the regulatory agencies responsible for setting policy.[6]

With greater coordination between the agencies and the executive branch and an organization structured to focus responsibility, Congress

would be better able to oversee agency policy and, in concert with the President, improve regulation.

Accountability to the Executive Branch

The President is responsible under article I of the Constitution to "take care that the laws be faithfully executed." That duty extends to the activities of the regulatory agencies to assure that the laws enacted by Congress are carried out effectively and fairly. The American public—to whom the President is directly answerable—looks to the President for leadership in pursuing national policy goals, including those affected by the regulatory process. The success of many Congressional and executive programs ultimately depends on a coordinated regulatory response.

Several recent Presidents have recommended changes in the regulatory process.[7] Although many proposed reforms have fallen short of enactment, these Presidents presumably felt that such recommendations were part of their responsibility to oversee faithful execution of the laws. Congress has repeatedly recognized the President's role in the regulatory scheme by authorizing him to make organizational changes in all agencies of the executive branch without distinction between executive agencies within the Departments and independent regulatory commissions.[8]

If regulation is to be more responsive to the public interest and coordinated with national programs, it must first be brought within the ambit of elective government, with accountability to those officials to whom the public and the regulated industries alike look for fair and constructive application of national policy.

REGULATION BY INDEPENDENT COMMISSIONS

Historically, at least four premises have been offered to support regulation by independent commission.

The first is that Congress delegated unique legislative authority to carry out certain critical regulatory functions and created a unique form of organization, the independent commission, for that purpose. Yet, most executive departments also possess delegated regulatory powers. For both, Congress enacts skeletal legislation setting forth principles, mandates, and limitations within which the traditional executive departments and agencies develop rules, standards, and regulations to give substance to a legislative program.[9] It is difficult today to discern the distinction which justifies wide differences in the structure and processes of the Federal Trade Commission on the one hand and the Food and Drug Administration or Federal Aviation Administration (both headed by single administrators) on the other. The most recent agency to be vested with

regulatory functions, the Environmental Protection Agency,[10] incorporates the concept of unitary leadership in place of the commission form.

Second, it is argued that to deal with complex and technical regulatory problems, special expertise is required of decisionmakers and that the commission form alone best develops that expertise. The commissions have not, however, demonstrated consistent mastery of the subjects within their jurisdictions.[11] Nor does their technical capability visibly surpass that of regulatory counterparts within executive departments.

Third, it is urged that the application of regulatory statutes, rules, and regulations requires a bipartisan, multimember body that can act without regard to the partisan considerations which affect Congress or the executive branch. Political pressure coming from Congress or the executive branch unquestionably impinges on the impartiality of commission proceedings. But the procedural requirements of adequate notice and fair hearing, as well as the availability of judicial review, help to assure, as much as anything, a just result in particular proceedings. In the opinion of several observers of the regulatory process, the fairness of regulatory decisions results more from the mechanics of internal decisionmaking and breadth of perspective of the regulators than from the fact of bipartisan representation on the commissions.[12]

A fourth premise often asserted in support of the commission form is that commissions can better serve the public interest in regulatory matters because their independence makes them immune from control by the industries they regulate. The assumption which lies behind these assertions is that the interest of the industries and of the public are in fundamental conflict. But today, those interests are closely related, for the success of an industry will have a marked impact on the extent, quality, and price of available goods and services. Nevertheless, undue or unbalanced influence upon the commissions by the industries regulated is undesirable. While the adversary nature of commission proceedings decreases the likelihood of such influence, when it occurs, it is an outgrowth of the dependence of the regulator on the regulated—a relationship which may occur regardless of form.[13] To the extent the form of organization is responsible at all, the very anonymity of the commission structure which heightens unaccountability tends to prevent public exposure of relationships which may be improper.

The foregoing does not set forth all the premises underlying the commission form for use in economic regulation.[14] Other arguments for the establishment of the commissions range from the discomfort of many courts with complex economic and technological problems to the need for expeditious procedures in regulating commerce.

At the very least, these reasons for regulation by independent commis-

sion, if ever valid, are today of questionable validity. In practice, the commission form has proven most of them to be invalid.

REGULATION AND INDUSTRY EXPANSION

The form of the regulatory commissions, compatible with another era, prevents them from responding effectively to economic trends and changes in technology, industry structure, and public needs.

The Interstate Commerce Commission, first among the Federal regulatory commissions, was established in 1887 to achieve rate stability, prevent discrimination in favor of large shippers and certain geographical areas, and protect farmers from undue charges by railroads. Today, some of the surface transportation industries suffer major economic hardship partly caused by the regulatory processes themselves.

Given the likely impact of such developments as containerization, jet freight carriage, and the interstate highway system, as well as the needs of a growing and concentrated population, modes of transportation within ICC jurisdiction must be viewed together with other modes as an integral part of a unified transportation network. Other carriers not regulated by the ICC affect and are affected by ICC decisions. Urban mass transit is a concern of the ICC, CAB, and the Department of Transportation. The ICC and the CAB exercise jurisdiction over inland segments of overseas shipments while the FMC and CAB exercise jurisdiction over the ocean segment of such shipments, even though containerization has made possible a continuous flow of commerce from the interior of the United States to the interior of other continents. Fragmented regulation of the transportation industry is inconsistent with efforts to develop a coordinated transportation system. It frustrates the development of management and financial capability in the industries involved, and impedes the rate at which new technology can be utilized.

The Federal Trade Commission was created in 1914 to prevent unfair methods of competition by businesses in interstate commerce. Originally intended to augment antitrust enforcement, the FTC has become a repository for many bits and pieces of legislation that did not seem to fit neatly into any other agency of government. Consequently, FTC jurisdiction now ranges from the complexities of large corporate mergers to the comparatively simple task of accurate labeling of fabrics and furs.

The Federal Power Commission originated in 1920 with the relatively tidy mandate of licensing construction and operation of hydroelectric power plants on bodies of water within the jurisdiction of the Federal Government. It now also regulates transmission and wholesale marketing of electric energy in interstate commerce, including rates, accounting procedures, mergers, consolidations, interconnections, and

coordination of interstate electric energy systems. The FPC similarly regulates transmission and wholesale marketing of natural gas in interstate commerce. An increasingly complex interstate energy system affecting the well-being of every citizen makes these regulatory tasks monumental.

The Federal Communications Commission was set up in 1934 to bring order to radio spectrum allocation and to regulate the existing telephone systems as a monopoly service under legislation that authorized exclusive operation in the public interest. To these has been added regulatory responsibility for standard television broadcasting, cable and subscription television, satellite communications, and computer utilities.

The Securities and Exchange Commission, also a product of regulatory legislation in the 1930's, was established to promote public confidence, through government oversight, in the issuance and trading of securities. But today, the SEC must deal with related problems of public ownership of brokerage firms, the operations of securities exchanges, the effects of computerization and new financing techniques, and the advent of major institutional investors.

The Civil Aeronautics Board, created in 1938, dramatically illustrates the way in which technology has challenged the ability of regulatory commissions to respond to change. The CAB initially concentrated on safety regulations and awards of mail routes. Today, the Board oversees an industry experiencing recurring economic problems and faced with crowded airways, jumbo jets, inadequate terminal facilities, and problems yet to be generated by the SST. These factors materially affect the ability of the industry to provide good service and at the same time impinge on the economy, our physical environment, and transportation modes not regulated by the CAB.

The Federal Maritime Commission, which in 1961 replaced the Federal Maritime Board established under the Shipping Act of 1916, today is involved in tasks of international importance. The FMC must deal with the effects of containerization and other technological innovations in ocean shipping. The Commission must also resolve problems relating to joint through rates and single bills of lading, its impact on modes (including foreign carriers) it does not regulate, and pricing through international shipping conferences.

The end result of this period of unparalleled technological change, industry expansion, economic growth, and environmental and social concern is that new responsibilities and workloads generated by routine matters have outdistanced the commissions' ability to respond. As the volume of proceedings has increased with each new responsibility, internal commission structure and process has become more complex. While some attempts have been made to remedy these problems through inter-

nal reforms, little thought has been given to restructuring the entire regulatory apparatus.

But it is not the mounting ineffectiveness of the regulatory framework alone which compels change. The world is in an era of transition that challenges government and private sectors alike to deal constructively and cooperatively with the economic issues, current, prospective, and unforeseen. The independent regulatory commission's inflexible institutions attuned to a simpler day, cannot be expected to deal constructively with economic issues yet to be generated if they are unable to deal with current ones. More than ever, a new framework is needed for improved regulation and as a necessary first step to reconsidering the statutes which authorize economic regulation.

A NEW CONCEPTUAL FRAMEWORK

The failure of regulatory commissions to respond to current demands and the unlikelihood of their responding to new ones is principally attributable to collegial organization, the judicial cast of agency activities, and the misalignment of certain functional responsibilities.

The collegial form is today inappropriate for regulating highly complex, everchanging areas of the economy. What is needed is a regulatory structure which is more adaptable to changing conditions and better able than a collegial body to articulate policy. Plural-headed administration is usually characterized by shared powers, shared responsibility, and, for that reason, shared indecision and unaccountability.

In addition, overjudicialization, resulting from full commission review of initial agency decisions as a matter of course, has upset commission priorities and obscured the formulation of comprehensive, timely, and anticipatory agency policy. Moreover, the admixture of certain judicial functions with policymaking and prosecutory responsibilities has created a condition of apparent bias in certain proceedings, subjecting agency determinations to criticism on that ground and generally undermining confidence in the regulatory process.

Finally, certain regulatory activities are improperly divided among, or unwisely combined in existing commissions.

Agency Administration

We have considered several alternatives and have concluded that the best approach to solving the problems created by the commission form is to replace commissions—for transportation, power, securities, and trade practices regulation—with single administrators. These officials should be appointed by the President, upon the advice and consent of the Senate, to serve at the pleasure of the President.

We believe single administrators will enhance leadership, improve the management of operations, and insure accountability in the regulatory agencies, where these vital requirements for program effectiveness are now often weak. This form of organization would also strengthen program coordination where two or more agencies need to work together to achieve a common goal.

Specifically, as described in detail in chapter 1, the single administrator would:

- Enable an agency to attract and retain highly qualified executives and staff because of better-defined, singular authority and responsibility;
- Encourage formulation of policy through informal procedures and rulemaking rather than case-by-case adjudication;
- Foster improved policy coordination among the agencies and with executive departments;
- Facilitate more immediate response to the needs of the public and to structural, economic, and technological changes in the regulated industries; and
- Promote more efficient allocations of agency resources by encouraging the use of modern management methods, including greater delegation of authority and more direct staff accountability.

Unitary leadership will not solve all regulatory problems. An agency so led may flounder for lack of the right kind of leadership or suffer from misguided efforts. But fault for that lies in the quality of the appointment not the form of organization. In such a case, responsibility lies with the President who has power to make the necessary change.

We suggest retention of plural leadership in the communications and antitrust areas because of overriding considerations which in our view supervene the benefits of the single administrator form. These considerations are discussed in chapters 4 and 7.

Review of Agency Decisions

The regulatory commissions have tended over the years to overjudicialize agency process by adopting a case-by-case approach. Excessive judicialization has fostered the development of ad hoc policies often limited to the particular fact situation at hand and therefore without general applicability or future effect.

Such judicial preoccupation, seen most readily in the course of systematic full commission review of decisions by agency hearing examiners, generally has precluded early, comprehensive statements of policy through rulemaking proceedings and other informal policymaking procedures. It has prevented the application of current agency policy by examiners while implicitly encouraging appeals to the full commission for a de

novo review of findings and legal issues raised in hearings. It has spawned an overly legalistic attitude which permeates all agencies and narrows the perspectives of staff and commissioners. The judicial attitudes and procedures of the commission have unduly prolonged proceedings and nurtured high case backlogs leading to ineffective uses of agency resources.

To rectify this situation, we propose that, instead of reviewing each initial decision as a matter of course, the single administrator of the restructured transportation, securities, and power regulatory agencies, and the new trade practices agency, review selected cases primarily for consistency with agency policy. Action by the administrator to overturn, modify, or remand an examiner's decision should be taken within 30 days and should set forth the reasons underlying such action.

Final agency action would be subject to review in the Federal courts. Whereas judicial review is presently exercised by the U.S. Courts of Appeals, we propose that, except for trade practice proceedings, review be transferred to a new Administrative Court of the United States. That court would be expert as to both the substantive issues involved in transportation, securities, and power legislation and the procedural intricacies of the Administrative Procedure Act which governs agency and review process. Moreover, the court's familiarity with problems of regulatory administration and the need for expedited procedures can be expected to aid in displacing the court-like posture of the agencies while maintaining regulatory fairness. We anticipate that removing judicial review of agency process from the Courts of Appeals will reduce somewhat the load on those courts and eliminate much of the agency preoccupation with judicial procedures which derives from review by common law courts.

The Administrative Court should consist of as many as 15 judges, appointed by the President, upon the advice and consent of the Senate, to serve staggered terms. We suggest terms up to 15 years. Appointments should be made initially on a bipartisan basis, with no more than a bare majority from one political party. Subsequent appointments or reappointments, just as those to other Federal courts, should be made without regard to political affiliation. The length of judicial terms should be long enough to insure continuity of expertise and at the same time short enough to permit revitalization of the judicial process compatible with an expanding economy, new technology, and changes in industry structure. A Chief Judge designated by the President should assign judges to cases on a rotating basis rather than to specialized panels. This would allow judges to maintain an open perspective and avoid identification of particular judges with specific types of proceedings.

The Restructured Agencies

The single administrator form, limited internal review, and the Administrative Court create a structure within which several regulatory functions can be realigned to reflect a more rational and potentially more effective placement of responsibilities.

Transportation

Three agencies presently regulate transportation: the ICC (railroads, trucks, buses, freight forwarders, barge lines, and pipelines), the CAB (air carriers), and the FMC (maritime shipping). While the reasons for dividing responsibility among three agencies may have been compelling as transportation regulation evolved, we found no persuasive reasons to justify the continuation of these divisions. To the contrary, grouping these responsibilities within a single Transportation Regulatory Agency has many advantages. These are set forth at length in chapter 3.

Today, there is a singularly vital need for a regulatory facility which is consonant with the increasing interdependence of transportation modes, competition among the modes, and integration of transportation into effective networks. The proposed Transportation Regulatory Agency would be charged with weighing the interests of each transportation mode in terms of the public interest. Rules and procedures for uniform classifications and for coordinated rates, routes, and industry practices would be possible when now such action is virtually impossible.

Promotional as distinct from regulatory functions of the existing transportation agencies—such as the subsidy-granting activity of the CAB—should be consolidated in the Department of Transportation which has primary concern for industry promotion. This would eliminate conflicting responsibilities for promotion and regulation within a single agency.

Trade

While transportation regulation is in our view better administered by one agency, regulation of antitrust enforcement and consumer protection is ill-combined in the FTC.

Although both activities aim at assuring fair business practices and preserving competition in American industry, methods of investigation, negotiation, and enforcement of their respective statutory mandates differ widely. Each requires different expertise and procedures. Consumer protection relies primarily on the promulgation of rules and regulations together with field investigations. Antitrust enforcement entails intensive study of the industry and of the economic impact of industry practices.

As detailed in chapter 4, to fulfill these separable responsibilities the FTC should be abolished and in its place created a new Federal Trade

Practices Agency for protecting consumers and a new Federal Antitrust Board for antitrust enforcement.

The Federal Trade Practices Agency would establish trade practice policies, both on its own initiative and in response to public initiatives. It would also investigate actual instances of alleged violations of fair trade practices. Since many such complaints are of limited financial consequence and are amenable to prompt resolution, hearing examiners situated in regional offices of the agency could most expeditiously deal with them. In fact, today many such situations are resolved quickly through the most informal discussion betwen the FTC and alleged offenders. In those cases where substantial issues are involved, examiners' decisions should be subject to appeal in appropriate Courts of Appeals after opportunity for policy review by the agency administrator.

The Federal Antitrust Board, consisting of a chairman and two economist administrators, would continue dual antitrust enforcement with the Department of Justice. The chairman would be responsible for all executive and administrative duties, and would articulate agency policy. The multimember Board would permit comprehensive micro- and macroeconomic analysis by drawing upon the special expertise and perspectives of its members. Actions brought by the Board should be heard in the Federal district courts.

Securities

A new Securities and Exchange Agency should supplant the SEC. Internal review of certain judicial proceedings presently commenced before hearing examiners should be limited to 30 days and directed principally to assuring that decisions correctly reflect agency policy. Appeals from agency decisions should be to the Administrative Court. Original actions taken by the SEC in the Federal district courts should continue as they do today. For reasons stated in chapter 5, application of these structural changes would enable the agency to adapt readily to present and future needs of the securities industry and the investing public.

Regulatory responsibilities of the SEC under the Public Utility Holding Company Act of 1935 should be vested in the proposed power regulatory agency, since problems relating to the structure of public utility holding companies are properly within the competence of that agency. For many years, in fact, the SEC has drawn upon FPC expertise in administering the act. This proposal has long had substantial support from both the SEC and FPC.

Power

A new Federal Power Agency should replace the FPC. As with the proposed transportation and securities agencies, as well as for reasons

discussed in chapter 6, the power administrator would be able to respond more effectively than a multimember commission to the needs of the electric power and natural gas industries, their customers, and the public generally. Appeals from final agency decisions would be to the Administrative Court. As noted, the power agency should assume regulatory responsibilities under the Public Utility Holding Company Act.

Communications

The FCC regulates, among other things, radio and television broadcasting, both important sources of public information. To an extent not present in other agencies, regulation in this area involves personal value judgments as to the type, quality, and substance of programing—the product of the industry which the FCC oversees. Clearly, the public has come to rely on the broadcast media for much of its information. The mere appearance of possible undue influence over program content might undermine public confidence in the sources of its information. Thus, we believe it would be inadvisable to place in the hands of a single administrator the power to exercise control over industry members through licensing and programing decisions.

Moreover, because broadcast regulation is uniquely subjective in character, we believe that decisions in this area should reflect the personal values of more than a single individual. This is especially important in view of the fact that even though the damage to society from control of information sources may be substantial, there is no satisfactory remedy for undoing the harm. Accordingly, it is imperative, in the first instance, to build in added safeguards for assuring an uncontrolled flow of ideas and information.

For these reasons, more fully explained in chapter 7, the FCC should be retained as a multimember commission. To offset some of the disadvantages of plural administration, the number of FCC commissioners should be reduced from seven to five, to serve 5-year terms.

CONCLUSION

Most deficiencies and problems of the regulatory agencies stem from an inapposite wedding of form and function. The present commissions combine the passive, judicial characteristics of a court with the active policymaking responsibilities of an administrator, to the detriment of both.

Substantial changes are advisable in the present structure of regulation by collegial bodies. The transportation, power, securities, and trade practices agencies are in need of the vigorous reform which a single administrator is most likely to bring about.

We have not recommended single administrators for all the regulatory agencies because organizational theory should give way when other factors bear greater weight. Although we emphasize organizational principles, we think exceptions should be made where, on balance, supervening considerations apply or greater effectiveness is likely by retaining collegial bodies. Hence, we believe that the overriding needs for a mixture of views in the communications area and for extensive economic judgment at the point of decision in the antitrust field justify plural-headed organizations in these areas.

There has been no attempt to catalog all the flaws of the regulatory structure nor to set forth solutions to all problems. But we have identified the major problems; and we have suggested a constructive plan for refashioning the regulatory structure so that the agencies can perform more effectively and at the same time more fairly.

We do see, moreover, that in our complex and growing society economic regulation must be consistent in its purpose, constructive in its policies, and objective in its decisions. Regulators have the difficult task of balancing the interests of industries and of the public to insure that the latter is well served and that the former remain vigorously able to provide that service. Such is the goal of the proposals we have made.

NOTES

1. "It [the committee] is not persuaded of the soundness of the view sometimes asserted that, to the traditional threefold classification, there must be added a fourth power, conveniently called 'administrative,' which somehow involves the exercise of functions which are neither executive, legislative, nor judicial and thus escapes the necessity for safeguards which centuries of experience have built around the exercise of such functions." Report of the Special Committee on Administrative Law, before the 57th Annual Meeting of the American Bar Association, Milwaukee, Aug. 28–31, 1934, in "Separation of Powers and the Independent Agencies: Cases and Selected Readings," Committee on the Judiciary, S. Doc. No. 91–49, at 216 (1970).

2. The President's Committee on Administrative Management, "Report of the Committee With Studies of Administrative Management in the Federal Government," pt. I, at 40 (1937) (hereinafter referred to as Brownlow report).

3. See M. Bernstein, "Regulating Business by Independent Commission" 283 (Princeton University Press, Princeton, 1955) (hereinafter referred to as Bernstein).

4. See generally "Report of the Special Committee on Administrative Law" before the 57th Annual Meeting of the American Bar Association supra note 1; Brownlow report, supra note 2; "The U.S. Commission on Organization of the Executive Branch of the Government, the Independent Regulatory Commissions," Rept. No. 12, March 1949 (U.S. Government Printing Office, Washington, D.C., 1949) (hereinafter referred to as First Hoover Commission Report); Bernstein, supra note 3; J. Landis, "Report on Regulatory Agencies to the President-Elect," printed for use of the Senate Committee on the Judiciary, 86th Cong., Second sess. (1960) (hereinafter referred to as Landis report).

5. "Usually these investigations or hearings are sporadic in nature having been sparked by some incident that has caught the attention of the press. Regular surveys of their activities would be far more valuable." Landis report, supra note 4, at 34–35; "Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in the respect to the legality of their activities." Brownlow report, supra note 2, at 40.

6. "This arrangement [a chairman designated by the President and responsible for administration and staff] has advantages for the Commission as well. Over the long pull, it must function as a part of the Government as a whole. For one thing, it can accomplish its duties only with proper appropriations and that may require sympathetic help from the Chief Executive with respect to its budget." The U.S. Commission on Organization of the Executive Branch of the Government, Committee on Independent Regulatory Commissions: A Report with Recommendations, Jan. 13, 1949 (U.S. Government Printing Office, Washington, D.C., 1949) (hereinafter referred to as "First Hoover Commission Task Force Report"); "[S]o far an administration carried on by a group is concerned, there is little to commend it. It is on the purely administrative side that the independent commissions are weakest, and gain rather than loss would result from centralizing control and responsibility. * * * For purposes of management, boards and commissions have turned out to be failures." Brownlow report, supra note 2, at 21; "Administration by a plural executive is universally regarded as inefficient." "First Hoover Commission Report," supra note 4, at 5.

7. Eisenhower administration: "U.S. Commission on Organization of the Executive Branch of the Government, Legal Services and Procedure" (U.S. Government Printing Office, Washington, D.C., 1955) (hereinafter referred to as "Second Hoover Commission Report").

Kennedy administration: Landis report, supra note 4.

Johnson administration: "President's Task Force Report on Government Organization"; "Price Task Force 1964"; "Heineman Task Force Report 1967" (unpublished).

8. See, e.g., 5 U.S.C. 901 (a), 902(1)(a) (supp. IV, 1965–68); see also 5 U.S.C. 105 (supp. IV, 1965–68); 31 U.S.C. 2, 18(a)(b) (1964).

9. See, e.g., Packers and Stockyards Act, 7 U.S.C. 181–231 (1964) as amended (supp. IV, 1965–68), administered by the Department of Agriculture; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301–392 (1964), as amended (supp. IV, 1965–68), administered by the Food and Drug Administration; and the Commodity Exchange Act, 7 U.S.C. 1–17(a)(1964), administered by the Commodity Exchange Commission under the executive branch.

10. Reorganization Plan No. 3 of 1970, prepared by the President and transmitted to the Senate and the House of Representatives, July 9, 1970, pursuant to the provisions of 5 U.S.C. ch. 9.

11. "In both the ICC and the FTC, long tenures and the tradition of reappointment have tended to make incumbent commissioners relatively insensitive to new industrial developments and rather hostile to new ideas about regulatory policy and administrative practice." Bernstein, supra note 3, at 108.

12. "There is a little evidence that commissioners divide on major policy issues according to their party affiliations." Bernstein, supra note 3, at 104. See generally E. Herring, "Federal Commissioners—A Study of Their Careers and Qualifications" (Harvard University Press, Cambridge, 1936).

13. See E. Redford, "American Government and the Economy" 587–590 (Macmillan, New York City, 1965).

14. For an indepth historical analysis see "Final Report of the Attorney General's Committee on Administrative Procedure," ch. 1 (U.S. Government Printing Office, Washington, D.C., 1941); J. Anderson, "The Emergence of the Modern Regulatory State" (Public Affairs Press, Washington, D.C., 1962) (hereinafter referred to as Anderson).

Part II

General Organizational Proposals

CHAPTER 1

Agency Administration

PROPOSAL

That the transportation, power, and securities commissions be transformed into agencies headed by single administrators and that the consumer protection functions of the FTC be transferred to a new agency also headed by a single administrator.

In recent years, few segments of government have been the object of more consistent criticism than have the independent regulatory commissions. The criticism has come from consumers, members of regulated industries, and regulators alike.[1] It is now almost routine practice to condemn the commissions for a lack of resourcefulness, insensitivity, and for a general inability to respond effectively to the pressing problems within the scope of their responsibilities. Time and again the commissions have been refashioned by internal reorganization or by legislation,[2] but the basic mechanism—the commission form—remains essentially unchanged.

It would be easy to attribute dissatisfaction with the performance of regulatory commissions to the appointment process, to overidentification with the industries regulated, or to general bureaucratic inertia. In some instances it may be that these difficulties aggravate the basic deficiencies. In our view, however, these and other points of dissatisfaction are symtoms. The cause is more fundamental.

Today, many of the responsibilities of the independent commissions have been expanded [3] and their horizons broadened. Yet the commis-

sions, perhaps suitable to a simpler day, have not been freed from structural restraints that are antithetic to the accomplishment of their new missions. The commission form itself is deficient and stopgap adjustments will not suffice. That form inhibits the effective implementation of both old and new mandates in a rapidly changing economy.

Formerly, it may have been reassuring to view the independent regulatory commissions—with staggered terms and bipartisan membership—as having a sense of measured continuity. But continuity, to the extent that it ever fully existed in the commissions,[4] must be balanced by the need for expeditious response to developments in the regulated areas. In order to carry out their added responsibilities, the agencies now require a structural form which permits them to be managed more efficiently and effectively. That structural form must be better suited to timely agency action establishing priorities, formulating policies, and coordinating activities with those of other agencies.

EVOLUTION OF THE COLLEGIAL FORM

The evolution of the commission form of organization and criticism of it over the years demonstrates the problems inherent in collegial administration.

In the late 19th century, proponents of economic regulation began to urge creation of separate governmental bodies to exercise continuous regulatory authority over the railroads and other private industries. Congress itself could not daily monitor industry practices and their impact on the economy. Legislators wanted to be relieved of those burdens of rulemaking which were not conducive to a large representative assembly, preferring instead to seek advice from expert regulatory boards. At the same time, Congress did not want to abdicate its constitutional mandate, nor to create an unresponsive structure of non-elected officials determining private rights and regulating the economy.[5]

The first regulatory commission, the Interstate Commerce Commission, was established in 1887 [6] and served as the model for the other commissions created over the next 50-odd years.[7] But it should be recognized that when Congress first constructed the model, it was creating a new mechanism surrounded by many unknowns.[8] Consequently, it was appropriate to proceed with a sense of caution by building in a series of protective devices. Hence, Congress devised the collegial form with staggered terms for commissioners and prohibitions against dominance by a single political party.[9] In so doing, it created a relatively static form, emphasizing the legislative characteristics of compromise and continuity. Congress could not have foreseen at that time what has become the increasing necessity for balancing these characteristics with

those of executive management to meet the need for expeditious action and adjustment to new conditions.

For the most part, the commissions ably performed their anticipated roles at the outset. But despite changes in the economy and the structure of regulated industries, development of new technologies, and the broadened scope of commission responsibilities, the procedures and internal structure best suited to deal with those changes did not develop. Rather, reliance remained on a hoped-for body of experts, free from direct political influence, who would decide regulatory matters primarily on the basis of economic considerations.

Continuing concern over the performance of agencies laboring under the commission form led to several reorganization plans in 1950.[10] These sought to strengthen the powers of commission chairmen on the theory that more centralized accountability was needed. But this mild change was an inadequate response to the inherent deficiencies of the collegial form.[11]

The reorganization plans of 1961 [12] were derived from the proposals of James A. Landis to President-elect Kennedy.[13] These proposals urged that the position of chairman be strengthened and that all chairmen be appointed by and hold office at the pleasure of the President.[14] The reorganization plans accordingly increased the powers of commission chairmen and allowed for delegation of functions to individual members.

In our view, these efforts for strengthening or modifying the collegial form, while improving the performance of the commissions, did not go far enough. Each represented an attempt to cure deficiencies while preserving the essence of collegial organization, but each was ultimately unsuccessful because the deficiencies and the essence are inseparable. Interestingly, one of the regulatory commissions we did not study, the Atomic Energy Commission, understood this in 1962 when it recommended its own abolition and replacement with a single administrator:

> It was generally recognized, at the time the original act was passed, that the commission form of organization diffused responsibility and slowed down the decisional process. At that time it was felt that sacrifices in these areas were preferable to the concentration of power in a single individual in connection with this new source of energy. However, the circumstances are now markedly changed.[15]

These studies and proposals, we believe, provided the impetus for centralizing authority to improve regulatory administration.

Our findings in large part support and amplify previous criticism of collegial administration as an inappropriate form for meeting the demands of economic regulation (see apps. 1–A and 1–B). We have concluded that commissions of five, seven, or 11 nearly coequal members cannot, on the whole, satisfactorily perform the management functions

necessary for effective regulation. In the absence of overriding considerations, they should be replaced by single administrators.

CRITERIA FOR REFORM

The disabilities of the collegial form and the attendant advantages of the single administrator form are best reflected in an examination of four aspects of regulatory administration; namely, the effectiveness of policy formulation, the effectiveness of management, the extent to which agencies are accountable to Congress and the President, and the ability to attract and retain able personnel.

Policy Formulation

Collegial bodies are inefficient mechanisms for formulating and implementing specific policy in a timely manner. Thus they are not capable of effectively carrying out their fundamental responsibility to give meaning to the broadly stated objectives set out by Congress in the regulatory statutes. Generally, these statutes require the commissions to make findings that their actions further the "public interest"; set rates which are "just and reasonable"; and grant applications as required by the "public convenience and necessity."

Many specific policy determinations are needed to support these broad findings. The usual procedure is to formulate policy in the context of individual cases brought before the commissions for review. Policies thus made are narrow, after the fact, and at times inconsistent. They fail to provide sufficient, timely, or constructive guidance for interested parties.

Today the regulatory agencies face an increasing number of complex issues involving changes in the regulated industries, trends in the economy, and new and abiding concerns of the public. If the agencies are to be better able to discharge their responsibilities, they will have to devote added attention to formulating anticipatory policies of wider applicability. To accomplish this, they need to adopt the more efficient methods of formulating policy through informal procedures and the issuance of rules and regulations. These methods have often been urged on the commissions but have been too little utilized through the years.[16]

Coequal commissioners too often have difficulty agreeing on major policy statements or rules. They tend to avoid the difficulty, preferring to wait for a suitable case to come along which will force the issue, though often in a narrow fact situation. Thus, to a large extent, commission policy must be discerned from an analysis of ad hoc case determinations which frequently do not give sufficient guidance with respect to similar but distinguishable situations.[17]

This unnecessary guessing game may be accentuated when decisions are rendered by divided commissions or when the composition of commissions changes.

Replacing collegial bodies with single administrators and limiting internal review (see ch. 2) would lessen the overjudicialization of agency procedures and cultures now endemic to regulatory commissions.[18] Resolution of issues and formulation of policy would not be delayed by the need to obtain agreement among a majority of commissioners. There should be a greater disposition toward anticipating problems and developing solutions through the use of rulemaking and informal policy statements. This approach would present opportunities for developing policy as needs arise and before options are foreclosed by the passage of time or by changed circumstances.

A single administrator would not be prevented by disagreements among coequals in the formulation of agency policy from implementing that policy through appropriate delegations of authority to agency staff. Staff members, in turn, would be more cognizant of agency policy and would better appreciate their roles in carrying out such policy.

Further, the regulated industries would be able to conduct long-range planning with greater confidence that their activities conform to agency policies. Undoubtedly, some portion of industry transgressions of regulatory rules stems from the inability to anticipate regulatory judgments. If the ground rules were clearly delineated, many such violations could be avoided, permitting an agency to reduce the proportion of its resources which would otherwise be allocated to prosecutory functions. Moreover, it is difficult and costly to undo the effects of past violations. The agencies, the industries, and the public should not have to bear this burden where violations could be avoided by timely action.

Since collegial bodies tend to withhold policy pronouncements until cases are actually before them for review, hearing examiners are often without necessary guidance. If the decisionmaking process is to be improved, those who make initial decisions must be familiar with current policy. Timely formulation of policy through rulemaking and informal procedures would expedite the resolution of many contested matters and should avoid the need for a good deal of the litigation that now takes place. With clearer policy direction, examiners' initial decisions would more frequently constitute the final agency determination and would be arrived at expeditiously and without undue cost to the parties.

Management

Collegial bodies are not an efficient form for managing operations. They fail as managers because of the ambiguity of direction inherent in the separate authority vested in each of the members. For precisely the

same reason that collegial bodies are often effective for making broad policy, they are ineffective for carrying out the management of that policy. Extensive deliberation, multiple and conflicting values, and disparate views, necessary to developing broad policy, are the very factors which create inefficiency when trying to implement policy through the management of resources in day-to-day operations.

In 1937, the President's Committee on Administrative Management observed that:

> For the purposes of management, boards and commissions have turned out to be failures. Their mechanism is inevitably slow, cumbersome, wasteful, and ineffective, and does not lend itself readily to cooperation with other agencies. Even strong men on boards find that their individual opinions are watered down in reaching board decisions. When freed from the work of management, boards are, however, extremely useful and necessary for consultation, discussion, and advice; for representation of diverse views and citizen opinion; for quasi-judicial action; and as a repository for corporate powers.
>
> The conspicuously well-managed administrative units in the Government are almost without exception headed by single administrators.[19]

The Attorney General's Committee on Administrative Procedure concluded in 1941 that the collegial form diffuses rather than centralizes the responsibilities of commissioners. The committee found "* * * frequent reluctance of high officers, charged with serious policymaking functions, to relinquish control over the most picayune phases of personnel and business management." [20]

The First Hoover Commission reported in 1949 that administrative direction had not developed within the independent commissions. "Their chairmen are too frequently merely presiding officers at commission meetings. No one has been responsible for planning and guiding the general program of commission activity." [21] It restated what is now almost a management axiom: "Administration by a plural executive is universally regarded as inefficient." [22] The Hoover Commission's task force report, issued in the same year, concurred that: "It is very difficult for five or more Commissioners to direct the work of the bureaus, or for the bureau chief to report to five or more masters." [23]

We believe the inefficiency of collegial bodies as managers is an outgrowth of two characteristics inherent in the collegial form. The first is court-like behavior, leading to an overjudicialization of agency process; the second, an absence of authoritative and adaptable management, able on its own to exercise each management function in such a way as to carry out broad policy. Agencies lack such management precisely because they determine and administer policy through the same medium, the case.

Ineffectiveness manifests itself in four key areas of management, in that:

- Collegial bodies fail to coordinate regulatory policy with other executive agencies. As a result, they may develop policies inconsistent with those of other agencies or with broad governmental economic thrusts.
- The processes of collegial administration are unnecessarily protracted, creating backlogs and concentrating on details often at the expense of expeditious action and administrative flexibility. Such processes also prevent collegial bodies from adapting to ongoing changes in the economics, structure, and technology of the regulated industries.
- Collegial bodies perpetuate court-like environments which permeate the agency and have the effect of "legalizing" agency process and culture while deemphasizing disciplines which are useful and sometimes necessary for effective economic regulation.
- Collegial bodies give little direct consideration to the appropriate allocation of resources within an agency. Consequently, some functions are performed in great detail while others of equal importance may be either ignored or ineffectively carried out.

Coordination

If it were possible to segregate areas of subject matter responsibility between agencies, the inability of collegial commissions to coordinate their activities effectively with those of other government agencies might not be so critical. However, as delineation of mission becomes more difficult and as interrelated activities of other agencies assume greater significance, coordination becomes increasingly necessary. But coordination is impeded, if not frustrated, by the requirement that a majority position be reached before a commission can participate on a cooperative basis with another agency. The traditional reluctance of one agency to concede jurisdiction to another is exacerbated when negotiations with another agency must be approved, as now, by a multimember commission.

Consequently, most efforts at policy coordination take place as a result of statutory requirements for consultation or in the context of formal proceedings with other agencies appearing as parties to the proceeding. Efforts to carry out interagency compacts—as for example, on procedures to establish joint-through rates for the movement of goods—having been brought to the point of agreement, have then foundered on issues which lie deep in both inhibiting statutory authority and the indecisiveness of collegial management.

A single agency head, unhampered by the necessity of achieving agreement among a majority of commissioners, could respond to coordination needs in a timely and effective way. He could speak more authoritatively for the agency and better adjust his position as conditions required.

Adaptable Administration

One of the most pervasive characteristics of the regulatory commissions is their lack of adaptability. Agency action too often lags behind new technology, economic trends, and changes in industry structure. This is largely due to the fact that collegial administration, relying on compromise and case-by-case policy formulation, tends toward continuity rather than adaptability of policy. While important, stability should be balanced with adaptability to permit agency policy to reflect those changes in industry which materially affect the provision of public services and the strength of the regulated industry.

A single administrator would more likely to be receptive to changes made necessary by changes in technology, economic circumstances, or industry structure. Unlike a commission chairman, he would not have to garner a majority in order to act. He would be able, if necessary, to provide the expeditious response to change which is vital to effective regulation.

The delays and the resulting case backlogs which characterize most of the commissions are also an outgrowth of administration by case. Overemphasis on case preparation, both within the commission and among petitioners and respondents, has encouraged long delays. Today most regulatory commissions have cases pending which are four years old or more. Moreover, the emphasis on cases limits the extent to which agencies may use informal procedures in consulting with industry and consumer representatives to resolve difficulties in advance.

A single administrator, comparatively unhindered by direct involvement in the cases pending before agency examiners, could develop more efficient procedures for handling complaints, cases, and the like. He could also adopt innovations for constructive consultation with the public and the regulated industry.

Legalistic Environment

The legalistic environment resulting from commission predisposition to case-by-case analysis contributes to a passive, overly judicial approach in regulation. Further, since the commissions are constantly absorbed with cases that are presented to them, they lack the time and opportunity to establish and further regulatory priorities. Commissions generally view themselves as panels of judges emphasizing procedural niceties rather than the determination of broad policy. Agency staff has frequently be-

come occupied with legalistic solutions to problems to the exclusion or deemphasis of other valuable input from economists, engineers, environmentalists, and persons trained in related disciplines. Equally important is the fact that the industry and the public in general are required to shoulder excessive costs in the search for clear expression of regulatory policy and in their dealings with agencies on enforcement, compliance, information gathering, and related activities.

A single administrator, with a limited time for reviewing only selected cases primarily to assure consistency with agency policy (see ch. 2), could effectively change the legalistic milieu that pervades regulation today. He would, as a consequence, have more time to direct attention to setting priorities, formulating anticipatory policies, and addressing the many and varied socioeconomic factors affecting regulation.

Resource Allocations

Multiheaded management may also result in a misallocation of agency resources in the absence of agreement on well-defined priorities. While a commission chairman may have theoretical authority to direct staff activities, as a practical matter the staff will be inclined to respond to all commissioners. Thus, allocation of staff resources becomes difficult to control.

Moreover, as noted, many agency activities are most efficiently carried out in a less formal environment than that which surrounds commission case determinations. When case adjudication predominates, the resources of agencies are inevitably centered on this function. One result is to ignore other functions important not only to the balanced presentation of cases but to administrative effectiveness as well. Such areas as economic research, understanding of technology, and modern management science cannot flourish unless they are recognized as important and supported accordingly.

Relieved of the weight of case-by-case administration, a single administrator may give attention to the appropriate allocation of agency resources, building where necessary the staff and the competence to perform a broader and less restrictive range of functions.

In sum, by replacing the collegial form with a single administrator, the defects which stem from the absence of responsible management and overjudicialization can be corrected. A single administrator will be able to command the necessary elements of the agency in such a way as to carry out the management functions necessary to effective administration. Through the exercise of such authority, he could reduce substantially delay in process, backlogs, and the operating inefficiency of economic regulation. He would be able to limit the cost effects of such regulation upon each of the parties to it. A single administrator would have the

opportunity to determine agency priorities and to allocate resources accordingly to insure that each of the agency functions are appropriately staffed and funded. Finally, a single administrator would have the opportunity to manage the functions of an agency in such a way as to minimize the effects of overjudicialization. He could do this not only by limiting the extent of his own reviews but by building up requisite functional specialties and, through his own example, stressing the balance of flexibility and adaptability with continuity and policy stability.

Accountability

Independent regulatory agencies headed by collegial bodies do not and probably cannot provide for the political accountability required to insure public responsibility. It has been argued that the bipartisan collegial form and fixed terms for commissioners are necessary in order to immunize economic regulation from political control. It is important, however, to distinguish between two types of congressional and presidential control relevant in this context, namely: (i) review of agency performance, and (ii) improper political influence over agency decisions.

Accountability is an essential element of democratic government. The Congress and the President are accountable to the people for the performance of government. In turn, agencies of government headed by appointed officials should be responsive and responsible to the Congress, to the Executive, and through them, ultimately to the public.

The overseeing of economic regulation by responsible public officials, necessary to assure effective discharge of agency responsibilities, cannot exist if the decisionmakers are immune from public concerns as expressed through their elected representatives. A serious flaw of the collegial structure is an inability to fix responsibility due to the inherent diffusion of authority among relatively anonymous coequal members. In addition, appointment for fixed terms gives commissioners a degree of independence that may serve to protect them from improper influence but was not intended to allow them to become unresponsive. Insulated to a degree from both Congress and the President, these agencies have little support within government and hence lack one of the major incentives which motivates effective performance.

Without clear accountability for performance to either Congress or the President, it is not surprising that the agencies receive inadequate attention. Legislative and budget proposals seldom evoke active support outside the agencies and their problems receive relatively low priority.

Replacing the commissions with single administrators would provide the opportunity for accountability and support which does not now exist. A single administrator, serving at the pleasure of the President and

personally answerable to the Congress, could not avoid public exposure and would be more responsive for that reason. Because his performance would directly reflect on the executive branch, the President would be more inclined to attempt to remedy agency shortcomings whether due to a lack of legislative authority, ineffective administration, or inadequate funding. Congress, too, could look to an identifiable person to whom it could delegate responsibilities and direct its oversight inquiries.

A second possible avenue of political control is that of improper influence on agency decisions. The appearance that such pressures may exist is at least partially attributable to the appointment process. At times, the selection of new appointees has been used to effect a geographical, philosophical, or special interest balance on a commission in addition to the partisan balance required by law. It has become commonplace to hear a commissioner referred to as an "industry man" or a "consumer man" or hear a vacancy labeled as a "Western seat" or a "Southern seat." This association encourages speculation as to the possibility of improper political influence. Indeed, a commissioner appointed under these circumstances may himself feel that he represents a particular constituency and may be subjected to untoward pressures for that reason.

A single administrator might well be more immune from such pressures on his decisions than would a member of a collegial body. Individual responsibility and public exposure would afford him a broad and varied constituency which should serve as a protective shield against special interest pressures. Since he alone would be responsible for balancing all interests, the opposing tensions might well cancel one another out.

It has been contended that the bipartisan composition of commissions—with no more than a bare majority of members from one political party—helps to immunize regulatory decisions from partisan considerations, insulate decisions from partisan attack, and lend an aura of fairness to such politically sensitive matters as the granting of substantial economic rights and licenses.[24] There does not appear to be any way of measuring the efficacy of bipartisan checks. But it is unlikely that they are as meaningful as the checks of public exposure and political accountability to which a single administrator would be subjected.

Attracting and Retaining Able Personnel

Good organization does not automatically produce good results. Good men are also required. It is equally true that the effectiveness of able administrators can be seriously impeded by inadequate organizational structure. We believe that the talents of many good appointees have been wasted in the past due to the inherent limitations of the collegial form.

Indeed, talented executives have been deterred from accepting appointments to commissions because of these structural deficiencies.

Critics of the regulatory agencies have observed that some commissioners have not been well qualified for their task and that this shortcoming is the principal cause of agency ineffectiveness.[25] Much of the criticism is directed at appointees who lack familiarity with the regulated field at the time of appointment or at appointments made on various political grounds rather than merit. In our view, managerial ability to respond to the variety of challenges posed by the regulatory process, together with a structure that allows for such response, is as important as knowledge of the specific subject matter.

Merely exhorting a President to make better appointments will not cure the problem. It will always be difficult to find well-qualified men with executive ability who are willing to serve on a body of coequals which has management responsibilities. This difficulty is frequently ascribed to the frustration facing the vigorous administrator whose initiatives would be impeded by coequals and to the absence of individual responsibility and recognition.[26]

Where the regulation of important economic and social interests is to be placed in the hands of appointed government officials, it is essential to create the kind of regulatory framework which will attract men of administrative excellence and within which they can function effectively. Able administrators must be offered a challenge—which usually is related to the magnitude of responsibility and the degree of discretionary authority. The commission form minimizes the challenge because it diffuses responsibility and diminishes individual discretion.

The services of a talented administrator are difficult to secure when he will have to share authority with others. The opportunity to serve as sole administrator of the regulatory agency would magnify the challenge which collegial administration subordinates. At the same time, the single administrator structure would tend to insure appointments based on merit rather than weighted by considerations of balance, whether industry, political, or geographic. If a President has only one position to fill as the head of a regulatory agency, the appointment will receive more careful consideration since the administrator will be responsible for all operations of the agency and his performance will reflect more directly on the President. Moreover, it would clearly be easier to find one highly qualified executive than it is to find five, seven or eleven for a single agency.

Replacement of commissions with single administrators would also have salutary effects at the staff level. Leadership by a strong administrator could be expected to raise staff morale and improve performance that may lag because of the stress and confusion caused by reporting to

a multimember commission. A single administrator would also find it easier to replace less able staff without being impeded by long-standing commissioner-staff alliances.[27]

ALTERNATIVES CONSIDERED

In arriving at our recommendation for a single administrator, we considered and rejected several alternative structural reforms.

Among the alternatives considered were:

(i) *Reduction of the number of commissioners on each commission.*—Simply reducing the number of members of a collegial body would result in some improvement in agency performance. The fact that fewer persons would have to reach agreement on a specific point before a decision could be made would, in most cases, conserve time and expense. We rejected this alternative because it clearly would not go far enough. The basic deficiencies we found are inherent in the collegial form itself, not in the number of commissioners.

(ii) *Statutory placement of all administrative functions in the chairman and limiting other commissioners to reviewing cases.*—There have been attempts, as discussed previously, to effect this type of solution through various reorganization plans and proposals.[28] They have failed to achieve their intended purpose because as a practical matter the functions are inseparable. In view of the need for agreement from his fellow commissioners on policy matters, there appears to be no satisfactory way to give the chairman undiluted authority to manage the agency.

(iii) *Statutory placement of all administrative and case review functions in the chairman and limiting other commissioners to policy formulation.*—This type of structure would reserve to the agency executive and the collegial body those functions for which each is best suited. We believe, however, that overall management of operations, review of cases, and policy formulation are so interrelated that separating them would project an artificial cleavage which could result in conflict between administrator and board. This conflict cannot be resolved without placing responsibility for review of agency performance in the hands of the board. Although the board would be more remote than it now is, the arrangement would preserve much of the ambiguous responsibility of the existing commissions and vitiate accountability for that reason.

(iv) *Creation of a commission on commissions to oversee selection of appointees.*—This alternative assumes that the major cause of ineffective regulation lies in the quality of commissioners. While we have found that the attraction and retention of highly qualified personnel poses a

significant problem for the regulatory agencies, the inability of commissions to perform satisfactorily results more from their organizational structure than from defects in the recruitment process. Even if the best qualified person filled each position, the collegial structure would impede effective performance.

(v) *Establishment of a commission to resolve cases involving overlapping jurisdiction or conflicting policies among commissions.*—This alternative would be an attempt to overcome the problem of lack of coordination among agencies carrying out related activities. But the creation of another layer of regulation would raise more problems than it solves in further fragmenting accountability and responsibility for regulatory performance. If it is unclear now who is responsible for decisions, it would be even less clear with the creation of such a commission. Problems stemming from conflicts in policy are reduced by limiting the entities involved in formulating policy, not adding to the number. This is one factor that led us to recommending consolidation of three transportation regulatory agencies (see ch. 3).

We concluded that these alternatives would have too limited an effect on the underlying inadequacies of present regulatory structure. While each might afford some degree of improvement, serious flaws would remain to handicap effective performance.

CONCLUSION

Frustration surrounds the appointment of commissioners who cannot, because of organizational barriers, exert needed leadership. Regulation by committee has proved both ineffective and unresponsive. Limitations of the collegial form have impeded the modernization of procedures to keep pace with changes in the regulated industries, trends in the economy, and the needs of the public.

Eliminating the commission form is not, of course, a guarantee of improvement. There can be no assurance that a single administrator may not be short-sighted or that he will not consistently wait for controversies to develop before deciding policy. The form itself will not automatically produce an effective leader, but it does afford the opportunity for leadership.

The single administrator would be more visible to all concerned and therefore more easily held accountable for agency performance.

The burden of responsibility would be shouldered by one identifiable person. Agency policy and direction would more likely conform to the interests of the public, Congress and the executive branch, and would result in a more expeditious and fair response to the regulated industries.

NOTES

1. See, e.g., "A Bill To Abolish the Interstate Commerce Commission," S. 4371, 91st Cong., Second sess. (1970) (introduced by Senators Mansfield and Church); E. Cox, R. Fellmeth, and J. Schultz, "The Nader Report" on the Federal Trade Commission (Baron, New York City 1969) (hereinafter referred to as "Nader Report on the FTC"); R. Fellmeth, "The Interstate Commerce Omission" (Grossman, New York City, 1970) (hereinafter referred to as the "Nadar Report on the ICC"); D. Bonafede and V. Hirschberg, "Transportation Report," CPR National J., 2749 (Dec. 19, 1970); Address by P. Elman before American Bar Association, "The Regulatory Process: A Personal View," in St. Louis, Aug. 11, 1970, reprinted in BNA Antitrust and Trade Reg. Rptr. No. 475, D1–D5 (Aug. 18, 1970) (hereinafter referred to as "Elman"); "America's Sound Transportation Review Organization," the American Railroad Industry (Washington, D.C. 1970).

2. A recent example of an effort from within to reorganize an agency is found in the changes in the FTC made under former chairman Casper Weinberger. FTC press release, June 8, 1970. Various reorganization plans over the years have also been adopted to improve the performance of the agencies. See Reorganization Plans Nos. 8, 9, 10, 13, effective May 24, 1950, 15 F.R. 3175, 64 Stat. 1264–1266; Reorganization Plans Nos. 3 and 4, Plan 3 effective July 3, 1961, 26 F.R. 5989, 75 Stat. 837; Plan 4 effective July 9, 1961, 26 F.R. 6191, 75 Stat. 837.

3. See, e.g., infra ch. 4 notes 16–25 and accompanying text.

4. See infra note 6 and accompanying text.

5. See Bernstein, supra pt. I, note 3, at 13–35.

6. "An Act to Regulate Commerce," 24 Stat. 379 (1887) now codified and amended in Interstate Commerce Act, pt. I, 49 U.S.C. 1–22 (1964).

7. See "Hearings on H.R. 5423 Before House Committee on Interstate and Foreign Commerce" (74th Cong., First sess.) 392–93, 2170; Bernstein, supra pt. I, note 3, at 34, 74.

8. See generally Anderson, supra pt. I, note 10.

9. See General Services Administration, "United States Government Organization Manual—1970–71," at 403, 420, 428, 433, 440, 459, 483, for the length of staggered terms in each commission and the number of commissioners allowed in each agency from one party.

10. See Reorganization Plans Nos. 8, 9, 10, 13, effective May 24, 1950, 15 F.R. 3175, 64 Stat. 1264–1266.

11. See Landis report, supra pt. I, note 4, at 13.

12. Reorganization Plan No. 3, effective July 3, 1961, 26 F.R. 5989, 75 Stat. 837; Reorganization Plan No. 4, effective July 9, 1961, 26 F.R. 6191, 75 Stat. 837.

13. Landis report, supra pt. I, note 4.

14. Id. at 65.

15. Letter from AEC Commissioners Graham, Haworth, Olson, Wilson, and Seaborg to Budget Director David E. Bell, May 1962.

16. See D. Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 Harv. L. Rev. 921 (1965).

17. See Bernstein, supra, pt. I, note 3, at 180.

18. See infra ch. 2, notes 15–18 and accompanying text.

19. Brownlow report, supra pt. I, note 2, at 32.

20. Final report of the Attorney General's Committee on Administrative Procedure 21 (U.S. Government Printing Office, Washington, D.C., 1941).

21. "First Hoover Commission Report," supra pt. I, note 4, at 4.

22. Id. at 5.

23. "First Hoover Commission Task Force Report," supra pt. I, note 6, at 44.

24. See, e.g., R. Cushman, "The Independent Regulatory Commissions" 45–61 (Oxford University Press, New York City, 1941).

25. See, e.g., "First Hoover Commission Report" supra, pt. I, note 4, at 3. See generally Landis report supra pt. I, note 4; "Nader Report on the ICC," supra note 1.

26. See supra notes 19–23 and accompanying text.

27. See Bernstein, supra pt. I, note 3, at 174–76.

28. See supra notes 22–27 and accompanying text.

CHAPTER 2

Review of Administrative Decisions

PROPOSAL

That administrative review procedures be streamlined by limiting the scope and the time devoted to them and that the judicial review function be transferred from existing Federal courts to a new Administrative Court.

As the Nation moves toward the resolution of mounting economic, technological, and social problems that fall within the regulatory sphere, the burden upon administrators and the complexity of the administrative process will assume unprecedented proportions. Congress, when it addresses basic concerns usually establishes broad national goals by directing attention to the objective to be realized. Refining the congressional declaration and implementing objectives are in the main left to the expertise of administrative agencies.

Increasingly, the administrative structure cannot effectively discharge its responsibilities without basic change in the administrative decision-making process.[1] We believe that the agencies will have to develop mechanisms that are sensitive to, and capable of fairly balancing what often are competing needs. This is the thrust of such recent court decisions as *Scenic Hudson Preservation Conference* v. *FPC*,[2] *Udall* v. *FPC*,[3]

Medical Committee for Human Rights v. *SEC*,[4] and *Moss* v. *CAB*,[5] as well as The National Environmental Policy Act of 1969,[6] Executive Order 11514 for the Protection and Enhancement of Environmental Quality,[7] and agency guidelines promulgated by the Council on Environmental Quality.[8] For many agencies, these articulations of national policy have added a new and complex dimension to administrative decisionmaking.[9]

The objective of the President, the Congress, and of the courts in expanding agency horizons was certainly not to delay any further the implementation of basic national goals. Yet, as the decisionmaking process is expanded by the addition of responsibilities with which the agencies have little experience, delay and uncertainty will follow unless the administrative mechanism is reformed to permit sound, sensitive, and expeditious response.

As already discussed, a major contribution toward this end would flow from eliminating the collegial commission form and focusing responsibility in a single administrator. But that structural reform should be complemented by modifications in the process for deciding cases, both at the agency level and in subsequent judicial review.

As presently constituted, agency decisionmaking has two principal stages. First, a hearing examiner ordinarily renders an initial decision following an often protracted adversary proceeding which is reflected in an extensive and complex record.[10] Thereafter, it is usual procedure for the full commission to review that decision.[11] But the commissions, though unable to examine in detail the hearing records, are not at all reluctant to revise or reverse initial decisions, in effect making new policy case by case.[12] If the administrative mechanism is to be better able to attract personnel of the highest competence and to respond expeditiously to its important tasks, increased emphasis should be centered on the initial hearing stage. Beyond that, internal review should be the exception and, where conducted, should be completed within a significantly abbreviated time span. Moreover, in view of the specialized character of regulatory processes and their increasing complexity, together with the mounting caseloads of the Federal courts which review agency determinations,[13] we conclude that it would be desirable to establish a new mechanism for the review of agency decisions. Transfer of that function from the U.S. district and appellate courts to a specialized Administrative Court of the United States would assure more understanding and timely decisions and earlier implementation of new or changing policies.

THE IMPLICATIONS OF INTERNAL AGENCY REVIEW

If administrative agencies, and particularly regulatory commissions, are to discharge their legislative implementation responsibilities, they should rely less on the case-by-case approach to policy formulation and move increasingly in the direction of rulemaking, especially informal rulemaking, and other expeditious procedures. The disadvantages of the prevailing individual case approach are apparent.

First, commissioners tend to view themselves as judges atop an administrative-judicial hierarchy,[14] with principal responsibility to hear appeals from initial or recommended decisions of hearing examiners acting as finders of fact. They do not, however, accord the usual degree of appellate deference to findings and determinations of the trier of fact and indeed cannot so long as case-by-case review is the predominant vehicle for establishing agency policy.

Second, this preoccupation with quasi-judicial activities has diverted attention and resources away from the more important responsibility of comprehensive and anticipatory policymaking. To the extent that policy is formulated in an adversary context, commissions must fit their policy declarations within the limiting confines of an adversary record. This approach is a barrier to anticipating problems that should be addressed informally without need for, and long before, the culmination of protracted proceedings.

The result, of necessity, is piecemeal and often inconsistent or incomplete expression of agency policy rather than the implementation of objectives in a comprehensive setting. Apart from the obvious delay in policy formulation and the accompanying case backlog, individual litigants incur costs which should more appropriately fall upon the public generally. Perhaps of greatest significance, hearing examiners as well as interested members of the public frequently are unable to discern agency policy and thus be guided in conforming their activities to that policy.

Third, overjudicialization of the agency review process has a generally debilitating effect on the administrative mechanism. Proceedings before hearing examiners have become more complex as the scope of issues which must be considered has broadened.[15] Rarely is it possible for a hearing examiner to try more than one or two cases simultaneously. Most agencies have three or four examiners for each commissioner and it is becoming commonplace for most decisions to be the subject of administrative appeal.

Consequently, a commission may have before it for resolution at any one time a dozen or more complex proceedings, each the subject of protracted hearings.[16] Obviously, it cannot be expected that every commis-

sioner, indeed that any commissioner, will be able to undertake an independent and full review of the more extensive records. Nor should they in view of the delays that would result. To meet this dilemma, most commissions have established specialized opinion-writing sections comprised of middle-level staff who review the record and write a draft of the "commission opinion." [17] To a great extent, they define the limits of the commission's sensitivity and its ability to exercise judgment in many cases. Former CAB Member Louis Hector, commenting on this procedure, has noted that:

> In the CAB and other regulatory agencies, the members of the agency merely vote on the outcome of a case and the opinion justifying the outcome is written by a professional staff. Members of these opinion-writing staffs explain that they consciously avoid statements of general principle as much as possible in the opinions they write, because they must be able to write an opinion justifying an opposite conclusion the next day, and hence must not be hampered by prior statements of general principles.[18]

As a result, the review function shifts from the commission to a staff group. This in turn relegates the hearing examiner to a subordinate role, which can have detrimental consequences. Hearing examiners may become demoralized and view their function as one of limited utility—an attitude that can encourage appeals, including a multiplicity of interlocutory appeals, which serve to further prevent a commission from directing attention to more important, comprehensive policysetting.

LIMITED INTERNAL REVIEW

If these serious deficiencies are to be overcome, it will be necessary to place a greater share of the responsibility for individual case determinations on the hearing examiners, leaving the administrator relatively free to concentrate on more appropriate means of formulating broad policy.

We propose that instead of engaging in the systematic review of initial decisions, administrators review, on their own motion, selected cases primarily for consistency with agency policy. Moreover, while the administrator should be able to modify or remand an examiner's decision, he should be required to act within 30 days of the date of the examiner's decision, stating in full the reasons on which his action is based. Where it becomes necessary for the administrator to remand a case, every effort should be made to assure that a final agency determination is not delayed unnecessarily. Fixing a time certain within which the agency decision would become final—not to exceed, for instance, 30 or 45 days—would promote expeditious treatment. That decision would then be subject to judicial review.

We are persuaded that limiting internal review in this way would revitalize the agency process. Administrators could concentrate on the enunciation of broad agency policy and guidelines. With clear policy directions, hearing examiners would be better able to apply agency policy to the facts at hand in more proceedings than is generally true now. Their initial and recommended decisions should become the final agency determination. In effect, hearing examiners would enjoy the status of administrative judicial officers. With added stature, it should be easier to attract and retain highly qualified persons to these positions.

JUDICIAL REVIEW

We have suggested reform of the internal administrative process so as to promote expeditious and consistent decisions and to fix responsibility and accountability. It is our view that these objectives cannot be realized fully if reform is strictly limited to administrative structures and procedures. To do so would ignore the influence of the judicial mechanism that has been superimposed on the administrative process.

With the exception of ICC determinations which are reviewed by a three-judge Federal district court,[19] administrative decisions with which we are here concerned are subject to review in the U.S. Courts of Appeals.[20] Traditionally, reviewing courts have recognized the limitations placed on the review function.[21] The ultimate objective of judicial oversight is more to insure the appropriateness of the administrative procedures than the wisdom of a particular administrative decision. The courts historically have recognized that their function is at an end when they are satisfied that the administrative agency, in proceedings before it, properly defined the issues, developed a complete record, and fairly resolved the issue in light of that record.[22]

Rarely, however are administrative findings the predicate for but a single decision. Rarely do administrative decisions have value as precedent for future decisions.

Rarely is the administrative choice simply to respond either in the affirmative or the negative. Between those extremes will lie a range of reasonableness and it is generally within that shaded area that the most appropriate policy solution is reached. Although often characterized as quasi-judicial,[23] the administrative decision is more analogous to the legislative process, making it impossible and inappropriate, in most cases, to attempt to apply a litmus-like test of correctness. Usually the thrust of administrative decisionmaking is to select the solution which, under the circumstances and in light of the policy objective to be realized, is the most correct or has the least adverse implications. For example, in a rate proceeding, the applicant for an increase may contend for an

8½ percent rate of return; consumer interests may press for 6½ percent. The answer often lies somewhere in between. Who better than the expert agency can say whether it is 7⅜ percent, 7½ percent, or 7⅝ percent?

The discharge of this quasi-legislative function can be impeded by undue deference to judicialization. Resolution of policy matters requires a type of flexibility that is unknown in our traditional common law judicial setting. Administrative agencies were established for the very purpose of placing technical expertise in a single forum and channeling to it problems which require that expertise for resolution. The judiciary, by design, does not share this characteristic with administrative agencies. Thus it is appropriate to apply considerably more stringent evidentiary rules in judicial than in administrative proceedings because care must be taken to protect jurors from matters which have not been subjected to the rigors of cross-examination and expert opinion.[24] Administrative agencies, however, enjoy a degree of technical competence in their areas of expertise which permits them to receive and evaluate submissions that have not been subjected to protective common law procedures. Indeed, such regulatory objectives as encouraging the broadest possible public participation and the expeditious resolution of issues can seriously be frustrated if agencies are *overly* concerned with rigorous judicial procedures and attitudes. So long as the common law judiciary serves as the primary vehicle for review of agency determinations, this deferential tendency can be expected to persist.

Under present appellate procedure, common law courts are called upon to review expert administrative judgments. In this, they act in marked contrast to their traditional role in proceedings which are initially and exclusively presented to the judiciary for resolution. That effort is less one of discerning the better of several possible resolutions than of determining right and wrong, culpability or not, liability or not.

In the administrative context, it is the regulatory agency and not the court which bears responsibility for the substantive decision. It is the expert agency that is to have ultimate public accountability for that decision. The courts, by and large, have recognized this. While it is not uncommon for them to set aside administrative decisions, they generally refrain from specifying the most appropriate means of achieving policy objectives. Judicial displeasure with an administrative determination will invariably be coupled with a remand, mandating the agency to rethink the problem free of any error that may have been cited. Ordinarily those errors relate not to the exercise of judgment but to procedural questions analogous to those regularly faced by the courts in discharging their common law function. Hence, consistent with the review provisions of section 10(*e*) of the Administrative Procedure Act,[25] courts have set aside determinations where the agency did not permit third-party inter-

ventions,[26] failed to develop a full record,[27] or improperly shifted a burden of proof.[28]

This is how it should be if ultimate responsibility is to rest with persons who can be held accountable for their judgments. Accountability and fairness, however, include not only arriving at a correct disposition, but its timely implementation. Indeed, where the effort is to respond to dynamic economic and social problems, the timing of the response often is of critical significance.

The Administrative Court

Streamlining the administrative structure will facilitate timely implementation of policy decisions. But it must be recognized that the demands on the present judicial superstructure increasingly threaten to nullify economies to be realized through structural reform.

Moreover, just as the pressures imposed on administrators have intensified, the burden on the courts has become more pressing. Never before have courts been asked to assume a heavier workload; never before have the pressures for timely judicial decision been greater. In 1957 there were less than 4,000 proceedings commenced in the U.S. Courts of Appeals while in 1969 more than 10,000 appeals were commenced; and between fiscal years 1966 and 1969 alone, the appellate workload increased 42.7 percent.[29] While the number of administrative agency appeals increased slightly between 1955 and 1969, criminal and quasi-criminal appellate matters increased approximately 4½ times. Similarly, in the Federal district courts where three-judge panels—normally consisting of two district judges and one appellate court judge—review ICC determinations, between 1968 and 1969 there was an 8 percent increase in the civil caseload and a 9.3 percent increase on the criminal side.[30]

This presents a significant dilemma. In view of the fact that to date the size of the judiciary has not been expanded to keep pace with the increasing caseload,[31] the question of priorities inevitably arises. In criminal proceedings, the right of both the individual and society to timely judicial resolution must be recognized and respected. Expeditious disposition of civil wrongs is also called for. In our judgment, these types of proceedings, which lie entirely within the province of the judiciary, should be acknowledged to be its priority assignment.

At the same time, the essence of administrative process is expeditious delineation and implementation of public policy. Where that process requires a significant alteration of economic or social policy, unnecessary delay in implementation cannot be tolerated if the public interest is to be served. If an agency has erred, it should be advised accordingly at the earliest possible time so that it properly can focus its attention and

expertise to the problem at hand. Conversely, where the agency response was a permissible one, all clouds of illegality should be removed as soon as possible so that the public and the industry can adjust their behavior as called for.

The present judicial review mechanism cannot, in view of all the competing pressures it faces, serve this need effectively.

We have concluded that the existing Federal courts should be free to concentrate on those priority areas in which only they can exercise ultimate decisionmaking responsibility and that a new mechanism should be created to respond to the unique problems presented by the administrative review process. We recommend that an Administrative Court be established and charged with the review of decisions of the transportation, securities, and power agencies.[32]

A single Administrative Court, with review authority over several agencies, would also permit the development of a uniform body of substantive administrative law. Moreover, while subject matter differs from agency to agency, there is little justification for major differences in procedures.[33] The rules of standing should be comparable as well as the privileges of cross-examination, production of documents, freedom of information, and other procedural guarantees. Inasmuch as a unified body of procedures would simplify the process and thereby encourage public participation, a single review court would assist in realizing that objective by assuring that procedural advances of one agency are adopted by the others.

In arriving at this recommendation, we considered the alternative that the collegial commission be retained in the form of a quasi-judicial tribunal solely to execute a review function. That is, the chairman would be given sole authority with regard to agency administration but decisions of hearing examiners would be reviewed by the full commission. We rejected this alternative because of the danger that the full commission, however precise and limited its scope of activities, would have a tendency to usurp the policy function vested with the chairman, thus continuing most of the serious deficiencies of the existing administrative structure.

Similarly, we rejected creating a separate administrative court for each agency. To so limit a court's scope would seriously diminish its attractiveness to the most qualified candidates for judgeships, would encourage an overassociation with the agency being reviewed, and might well lead to a usurpation of the agency's policy responsibilities. It would also preclude development of integrated administrative procedures as well as uniform application of procedural advances. The approach would create three courts where the discernible benefit to be derived is not greater than would obtain if one court were created.

Finally, we rejected the suggestion that a separate administrative court be established in each of several geographic areas. Any such division would perpetuate disparity of judicial interpretation and complicate the development of uniform procedures and review standards. This result is not uncommon today, with review in 11 regional Courts of Appeals.

It does not follow, however, that the Administrative Court should have a fixed venue. While it appears advantageous to give the court a nationwide jurisdictional scope, the court should be easily accessible to persons throughout the country. In 1966, Congress recognized that it would be a hardship to require that challenges to administrative action be initiated only in Washington, D.C. It responded by amending the venue provision to allow the filing of review proceedings in each of the 11 Courts of Appeals.[34]

In order not to inhibit access, we recommend that the Administrative Court develop procedures for assuring its periodic presence at locations across the country. In view of the novel nature of the court's structure, we believe that it would be best for it to experiment with alternative ways of meeting this objective. It may be wise to consider the possibility that the entire court ride circuit, that segments of the court sit permanently in several strategic locations, or any of several other alternatives.[35]

The Administrative Court should consist of judges appointed by the President, with the advice and consent of the Senate, to serve terms of sufficient duration as to attract men of quality. At the outset, we expect that as many as 15 judges would be needed, and suggest terms of 15 years. One judge should be designated by the President as Chief Judge, responsible for court organization, case assignments, and general supervision. Judges should participate in cases on a rotational basis, rather than be divided into subject matter panels.

CONCLUSION

The systematic and protracted review of initial agency decisions by the commissions interferes with agency administration. Limiting the review function and focusing its direction toward assuring policy consistency within the agency can be expected to free the administrator for the purpose of articulating policy through rulemaking and informal policy statements and guidelines. This would provide a clear sense of agency direction and spare persons dealing with the agency from costly and duplicate adjudications.

The agencies would continue to carry on investigations, conduct surveys, grant franchises and licenses, set rates, determine adequacy of service, review accounting practices, act upon extensions and discontinuances, weigh environmental considerations, hold hearings and conferences, and make decisions in all these areas.

An Administrative Court with appellate jurisdiction over agency determinations in the areas of transportation, power, and securities regulation should enhance the effectiveness of regulation. Its decisions would reflect an expertise ideally suited to review of administrative procedures and concerns. In addition, the transfer of regulatory cases in these areas to the proposed Administrative Court would ease the burden on other Federal appellate courts, allowing them to concentrate on matters of first priority.

NOTES

1. The need for structural reform in administrative decisionmaking has long been recognized. See Brownlow report, supra pt. I, note 2; "Second Hoover Commission Report," supra pt. I, note 7; L. Hector, "Problems of the CAB and the Independent Regulatory Commission," 69 Yale L. J. 931 (1960) (hereinafter referred to as "Hector"); N. Minow, "Letter to President Kennedy," May 31, 1963, published as "Suggestions for Improvement of the Administrative Process," 15 Ad. L. Rev. 16 (1963); Marks, "Revision of Structure and Functions of the Federal Communications Commission," 18 Fed. Com. B. J. 4 1963); Elman, supra ch. 1, note 1.

2. 354 F. 2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

3. 387 U.S. 428 (1967).

4. 432 F. 2d 659, rehearing denied (D.C. Cir. 1970).

5. 430 F. 2d 891 (D.C. Cir. 1970).

6. Public Law No. 91–190, 83 Stat. 852.

7. Ex. Ord. No. 11 514, 35 F.R. 4247 (Mar. 5, 1970).

8. 35 F.R. 7391 (May 12, 1970).

9. For example, under sec. 102(*c*) of the National Environmental Policy Act of 1969 (83 Stat. 852), each Federal agency is required to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

10. The finding of the Attorney General's Report of 1941 (supra ch. 1, note 20, at 61) in this regard is no less applicable today, notwithstanding enactment of the Administrative Procedure Act in the intervening years:

"[T]he administrative agencies have frequently failed to provide a speedy forum, unhampered by burdensome delays. Lengthy hearings and incredibly voluminous records sometimes running into tens of thousands of pages, have been phenomena not rare in the administrative process."

11. For example, in 1969 in the SEC, 12 of 13 initial decisions were appealed to the full Commission; in 1970, 17 of 20 initial hearing examiners' decisions were appealed. The FCC and ICC have intermediate appellate boards to review examiners' decisions, in lieu of full commission review in many cases.

12. Louis Hector, former member of the CAB, has observed that:

"The Board, in effect, tries the case all over again overturning the examiner's conclusions, which are certainly not considered binding and, on major issues, are not even treated as persuasive. There is often no mention of the examiner's decision or discussion of his specific mistakes or errors in the argument to the Board * * *.

"Having taken over decision of a case, the members of the Board do the best they can, but there is no real chance for a review of the record. Cases are decided on the basis of an outline of the issues and a list of questions to be decided prepared by the General Counsel's office and never seen by the parties. The members hear the oral argument—or read it if they are not present—and study the examiner's decision and the briefs to the Board, either personally or through their single personal assistant. The pressure of administrative matters, routine decisions and other major cases effectively prevents any contact with the record. The thousands of man-hours which go into the making of a record are virtually ignored at the crucial moment of final decision." Hector, supra note 1, at 945–946.

The full panoply for administrative and court review can be exhaustive. For example, in the FPC, the Permian Basin Area Rate case was brought before the agency in December 1960. The hearing examiner issued his initial decision in September 1964. The full Commission rendered its decision in August 1965. Subsequently, it was taken to the 10th Circuit Court of Appeals in October 1965 and a decision was issued in January 1967. The Supreme Court issued its decision in May, 1968. *Skelly Oil Co.* v. *FPC,* 375 F. 2d 6 (10th Cir. 1967), modified, 390 U.S. 747, rehearing denied, 392 U.S. 917 (1968).

13. In 1961 the total number of all appeals to the U.S. Courts of Appeals was 4,204, while in 1969 there were 10,248 appeals. Director of the Administrative Office of the U.S. Courts, 1969 Ann. Rept. 107; see also address by Warren E. Burger, Chief Justice, Supreme Court of the United States, before American Bar Association, "State of the Federal Judiciary," in St. Louis, Aug. 10, 1970.

14. See Elman, supra ch. 1, note 1, at 16.

15. Supra notes 2–8 and accompanying text.

16. For example, in the ICC in 1970 there were 12 rail, water and freight forwarder finance cases and 202 motor carrier applications for operating authority which had been on the docket for more than 4 years.

17. Thus, there is a special Office of Opinions and Review in the FCC; an Office of Special Assistants to the Commission in the FPC; and an Office of Opinions and Review in the SEC. Government Organization Manual 1970–71 at 421, 624, 635.

18. Hector, supra note 1, at 942.

19. 28 U.S.C. 1336, 2321–25 (1964).

20. SEC: 15 U.S.C. 77i(a); FPC: 16 U.S.C. 825*l*(b); FMC: 28 U.S.C. 2342; CAB: 49 U.S.C. 1486. See "Review of Orders of Federal Agencies," 28 U.S.C. 2341–2351 (supp. IV, 1965–68); Judicial Review, 5 U.S.C. 701–706 (supp. IV, 1965–68).

21. "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve * * *. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *NLRB* v. *Hearst Publications,* 332 U.S. 111, 130–131 (1944); see also L. Jaffee, "Judicial Review: Question of Law" 69 Harv. L. Rev. 239 (1955).

22. "For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the 'substantial evidence' test and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered." *Environmental Defense Fund Inc.,* v. *Ruckelshaus,* No. 23,813 (D.C. Cir. Jan. 7, 1971).

23. For a discussion of the judicial aspects of agency powers, see B. Schwartz, "Administrative Justice and Its Place in the Legal Order," 30 N.Y.U.L. Rev. 1390 (1955); J. Dickinson, "Administrative Justice and the Supremacy of Law in the United States," ch. II (Harvard University Press, Cambridge, 1927).

24. "The conclusion seems to be a rather easy one that to whatever extent the exclusionary rules are based upon the unique needs of the jury system those rules are a misfit for the administrative process. To the extent that the administrative process should copy evidence practices of the judicial process, the copying should be from the majority of cases tried by judges without juries, not from the minority of cases tried before juries." K. Davis, "Administrative Law Treatise" sec. 1403, at 264 (West Publishing Co., St. Paul, Minn., 1958).

25. 5 U.S.C. 706 (supp. IV, 1965–68).

26. *Office of Communications for the United Church of Christ* v. *FCC,* 359 F. 2d 994. (D.C. Cir. 1966).

27. *Udall* v. *FPC,* 387 U.S. 428 (1967).

28. *Environmental Defense Fund, Inc.* v. *HEW,* 428 F. 2d 1083 (D.C. Cir. 1970).

29. Director of the Administrative Office of the U.S. Courts, supra note 13, at 105, 108.

30. Id. at 116, 126.

31. For example, in fiscal year 1960 there were 68 judgeships in the U.S. Courts of Appeals and 2,220 cases pending. In 1969 there were 97 judgeships and 7,849 cases pending. Id. at 104.

32. There have, of course, been other proposals for administrative courts (see app. 2–A, 2–B). The Tax Court and the Court of Customs and Patent Appeals are two examples of existing administrative courts. The Tax Court is a court of original jurisdiction from which appeal is to the respective Courts of Appeals and then to the Supreme Court. The Court of Customs and Patent Appeals is an appellate court from which appeal is directly to the Supreme Court.

33. See Administrative Procedure Act 7, 5 U.S.C. 556 (supp. IV, 1965–68); J. Macy, Jr., "The APA and the Hearing Examiner: Products of a Viable Political Society," 27 Fed. B. J. 351, 386 (1967).

34. 28 U.S.C. 2343 (supp. IV, 1965–68).

35. In the Tax Court, for example, 99 percent of the cases are heard outside of Washington, D.C. Last year the judges traveled to almost 100 cities throughout the United States.

Part III

Proposals For Each Regulated Area

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CHAPTER 3

Transportation

PROPOSAL

That the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Maritime Commission be abolished and their regulatory responsibilities combined within a new transportation regulatory agency headed by a single administrator. That promotional functions of these agencies, including the subsidy-granting authority of the CAB, be transferred to the Department of Transportation.

It has become increasingly clear in recent years that the existing regulatory commissions have not contributed sufficiently to the solution of problems faced by the transportation industry and the shipping and traveling public it serves. There are those who suggest, with some merit, that the regulatory agencies may have impeded the growth of a balanced system and a profitable industry to serve the Nation's transportation requirements.[1]

The ICC, the CAB, and the FMC exhibit, in vary degrees, the deficiencies of collegial administration which indicate that fundamental reorganization needs to be undertaken before any significant improvement is realized in the effectiveness of these agencies. In this chapter, we discuss the form that reorganization should take—the replacement of commissions by single administrators for transportation regulation and the merger of all transportation regulation in one agency.

Each of the transportation commissions has for the most part: (i) concentrated its efforts on a case-by-case approach to regulation, lead-

ing to a large case backlog and, for the industries and public involved, long and costly delays in deciding cases (see app. 3–A); (ii) failed to coordinate policy effectively among themselves and with other Government agencies; [2] (iii) operated with inadequate support and personnel necessary to keep pace with the rapid growth of the transportation industries (see app. 3–B); and (iv) provided inadequate opportunities to attract and retain highly qualified administrators and staff.[3]

A FRAMEWORK FOR EFFECTIVE ADMINISTRATION

For the reasons stated at greater length in chapters 1 and 2, placing a single transportation administrator in place of the existing commissions, limiting review of proceedings within the agency, and providing for expert review in an Administrative Court would remedy many of these deficiencies.

The complexities of today's transportation industry require forward-looking regulation and long-range planning not usually attained by collegial bodies devoted to extended adjudication of individual cases. Referring to the CAB's difficulties, Chairman Secor Browne has described the problem presented by commission case-by-case adjudication:

> I don't blame this on my colleagues so much as I blame it on a regulatory atmosphere which is based on reaction rather than action. I don't know about the ICC or the FMC but at the Civil Aeronautics Board, we react; we don't act. We wait until somebody comes before us with a question or a problem and then we try to respond to it.
>
> This simply means that it is very difficult for the Civil Aeronautics Board or, I would think, any other transportation or other regulatory agency, to have effective policy. Policy that looks back, policy that is based on history, policy that waits for people to ask the question, it seems to me, cannot be very constructive.[4]

In our view, plural administration is a primary cause of this passive profile. The ICC consists of 11 commissioners [5] appointed by the President, with the approval of the Senate, for staggered 7-year terms. The CAB and FMC each have five commissioners appointed by the President, with the approval of the Senate, for 6- and 5-year staggered terms respectively.

A single administrator would provide the active leadership needed by the regulatory agencies to aid in solving the problems confronting the Nation's transportation system today. The single administrator could also simplify policy coordination with other government agencies, such as the Department of Transportation, whose programs also have a major impact on transportation. Under the existing structure of regulation, attention to interagency coordination is made difficult by the absence of a single structure to provide for central consideration of the interests of

all modes and by a court-like environment which slows agency decision-making. Without coordination of regulatory policy, regulatory actions can distort national priorities established by Federal, State, and local expenditures for transportation. In 1968, these expenditures approached $19 billion, an increase of over 63 percent since 1960 (see app. 3–C). Moreover, government programs for environmental protection, energy allocation, community development, and capital financing, each having an impact upon transportation but administered by agencies other than the ICC, CAB, and FMC, would benefit from the coordinated regulatory response of a single administrator.

In addition, if regulation is to be constructive and timely in responding to the needs of the public and the regulated industries, anticipatory planning and positive action should be the rule. Instead, case-by-case adjudication has diverted the focus of the commissions, as reflected in workload trends.

Thus, the ICC's total caseload has increased in 4 years from 7,677 to 8,334 (see app. 3–F, table 1). Average time for completion of ICC proceedings cases in fiscal 1970 was over two-thirds of a year, and has exceeded that in prior years. The formal backlog was 5,332 such cases and the trend for the last 5 years shows no signs of decrease (see app. 3–A). Over the years, ICC examiners have spent more and more hours in the hearing and initial report stages of each case (see app. 3–D, table 3) yet the number of hearing examiners and attorney-advisors who write initial reports for the ICC has decreased even as formal applications have grown (see app. 3–E).

In the CAB, route cases were up 22.1 percent in 1970 compared with 1965, while the personnel level remained relatively constant during the same period (see app. 3–F, table 2). The FMC had twice as many docketed cases in 1970 as in 1965 (see app. 3–F, table 3), yet there has been a 5.8 percent decline in FMC personnel in the last 5 years. Thus, overjudicialization has contributed to the generally increasing workloads confronting the transportation agencies.

Under our proposal set forth in detail in chapter 2, agency cases would be initially heard by an examiner. The single administrator would have 30 days to review an examiner's findings. The scope of review would be at the administrator's discretion, but because of the limitations of time his review would largely reflect his judgment on the consistency of the decision with agency policy. Final determinations by the transportation agency would be subject to review, upon request of any aggrieved party, by a three-judge panel of the Adminstrative Court. Appeals could then be taken to the Supreme Court. This procedure should provide the opportunity for increased planning, policymaking, and preventive action,

and lessen the time spent by the administrator and the agency in case-by-case adjudication.

While elimination of the collegial form in each of the separate transportation agencies would substantially improve the regulatory capacity of those agencies, it would not correct the deficiencies inherent in regulation by separate agencies of transportation modes which are increasingly interdependent. Nor would it resolve the conflicts which follow from the combination of regulation and promotion in the CAB and, to a lesser extent, in the ICC.

To accomplish these purposes, we recommend abolishing the ICC, CAB, and FMC, consolidating their regulatory functions in a single transportation regulation agency, and relieving the new agency of promotional responsibilities.

UNIFIED REGULATION—A SINGLE TRANSPORTATION AGENCY

The report to President Eisenhower by the Presidential Advisory Commitee on Transport Policy and Organization succinctly expressed the continuing demands of this Nation upon its transportation system:

> No economy that is based fundamentally on mass production and distribution of products throughout a continental market can continue to prosper without a transportation system that is dynamic, efficient, and capable of delivering goods and people with safety, expedition, with a high degree of dependability, and at the lower cost in the expenditure of manpower and other scarce resources.[6]

Over the years, observers of transportation regulation have concluded that three separate and distinct commissions for transportation regulation do not constitute an appropriate structure for achieving these objectives, nor for dealing with an increasingly complex transportation system and, in some cases, a financially troubled industry.[7] While the ICC principally regulates traffic carried by rail, bus, truck, barge, and domestic water carrier, and the CAB and FMC regulate international and domestic traffic carried by air and deep-water carriers respectively, decisions of each have an impact upon all transportation modes.

The structural separation of regulation frustrates attempts to achieve rational coordination and resource allocation among the modes as segments of a total transportation system. Half steps taken over the years to emphasize the total system rather than the separate modal orientations of three agencies have only perpetuated the defective structures. Such homage to existing institutions and reliance on stopgap measures are self-defeating. As the Doyle report stated in 1961:

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> There is nothing sacred about any organizational structure despite the length of time it has been in effect or the inertial resistance usually evoked when change is suggested * * * It should be adaptable to changing situations and should facilitate performance of the various functions for which it is designed. Since coordination of diverse activities is the most difficult of all management functions, organization should be deliberately planned to facilitate this function. Just as we should never advocate change for its own sake we should not maintain the status quo because we are too indolent or because we quail before the complexity of the task. We must remember that although the perfect organization cannot, of itself, insure coordination, a faulty organization can virtually assure failure to coordinate.[8]

The needs of the Nation for a coordinated transportation system must take precedence over parochial and modal concerns if the transportation industries are to meet the challenges of accelerating growth, the interdependence of modes, and changing technology.

Regulation plays an important and necessary role in helping to meet these challenges. But it will be difficult to discharge the role so long as the Government's own house fails to recognize in practice that these challenges can only be met effectively by coming to grips with the underlying interdependence of all modes. Former CAB member Louis Hector noted the need for a coordinated regulatory response upon his departure from that agency in 1959:

> The CAB in recent years has been busily engaged in certificating subsidized local air service into the smaller cities of the country as the railroads reduce or terminate passenger service to those towns. The Board has done this on the general theory that the Board's job is to promote air travel, and that as the railroads pull out the airlines should move in and take up the slack. The ICC has permitted the railroads to reduce or eliminate passenger service because they have been losing so much money on it. But the airlines also lose money when they take over local passenger service in small towns. The only difference is that the Federal Government makes up the loss to the airlines in the form of subsidy. Whether this takeover of nonsubsidized losing railroad passenger service by subsidized losing air service is in accord with sound national transportation policy or with the broader national interest is not a subject for discussion here. The point here is that there is today no machinery for determining such a question since there is no coordination between the ICC and the CAB on this matter, nor does either agency receive any coordinated guidance from the executive branch.[9]

What was the case 10 years ago is even more so today. Market and economic relationships of the transportation modes now make all the more relevant a regulatory structure which integrates policy for all modes.

The Department of Transportation was established with something of this rationale in mind. Proponents of the Department of Transportation Act of 1966 were clear in stating that the fragmentation of Federal efforts was no longer justified in light of interrelationships among the elements of the transportation system.[10] Senator Warren Magnuson, recognizing the impact of fragmentation on other facets of national policy, stated at the time: "We must avoid interjection of arguments between contending transportation modes into the planning for the conservation, development, and utilization of our water and land resources." [11] Recently, some authorities have argued that if consolidation of programs to promote transportation can be supported on the basis of the interrelationship of those programs, the same rationale supports consolidation of the regulation of the industries aided.[12] Clearly, the task of coordinating promotional and regulatory policy can be made substantially less difficult when two rather than four agencies are involved and two rather than a majority of 22 policymakers must reach agreement.

Finally, were we to have no regulation at this point in time and wished to begin, it is unlikely that we would design three agencies based primarily on the medium of transport with the mandates of the existing commissions to regulate transportation. Other alternatives might be: eight agencies—recognizing that each regulated mode had some distinguishing characteristics; or two agencies—distinguishing between domestic and foreign commerce, or between passenger and freight commerce, or between passenger and freight traffic. We rejected those alternatives because of their fragmented perspective which fails to recognize that transportation regulation is interlocked into a single system.

Evolution of Fragmented Regulation

Regulation of transportation by three separate agencies evolved largely out of congressional responses to periodic demands of the public and industry, coupled with the belief that divided agency responsibilities corresponded to significant differences in the transportation modes.[13]

Jurisdiction of the ICC

In the latter part of the 19th century, anticompetitive conduct of the railroads was injuring local industries and agriculture. The Senate's Collum Committee Report (1886), describing rebates and other discriminatory practices, led to enactment of part I of the Interstate Commerce Act [14] and to the creation of the Interstate Commerce Commission in 1887.

Through the years, reacting to specific demands for additional regulation, Congress conferred a patchwork of jurisdiction upon the ICC.

Today, ICC approval must be obtained for entry and development of freight or passenger service by railroads, for discontinuance of services, for pooling of traffic, service, or earnings, and for combinations, consolidations, and mergers of railroads.

The Interstate Commerce Act requires that the railroads file tariffs setting forth just and reasonable rates and prohibits unreasonable discrimination among shippers. Amendments to the act give the ICC minimum rate control and responsibility for regulating competition among the modes within its jurisdiction.[15] In addition, the ICC may permit carriers to form price-fixing conferences. After approval of the underlying agreement, activities duly undertaken in connection with such conferences are exempt from the antitrust laws.

In 1906, the Commission's initial jurisdiction was extended to include express freight companies, pipelines (except water and gas), and sleeping car companies.[16] Regulation of these entities is similar to that over railroads, except that the ICC has no power over entry or vertical ownership of such companies.

With the passage of the Motor Carrier Act of 1935, now part II of the Interstate Commerce Act,[17] Congress brought interstate motor carriers within ICC jurisdiction. Private carriage and agricultural trucking were specifically exempted.[18] The ICC was empowered to regulate entry of common carriers and contract carriers, to establish just and reasonable rates, to prohibit rate discriminations, to require filing of tariffs, and to review rate-fixing agreements, consolidations, mergers, and securities issues of motor carriers.

Under the 1940 Transportation Act, now part III of the Interstate Commerce Act,[19] Congress placed certain coastal, intercoastal, and inland water carriers under ICC jurisdiction. The regulatory scheme for water carriers is substantially the same as that for motor carriers, except that there is no control over their securities.

In 1942, part IV of the Interstate Commerce Act [20] brought freight forwarders—basically common carriers without actual transport capability—within ICC jurisdiction. Freight forwarders provide a valuable service for small shippers in that they combine small-lot shipments into carload lots eligible for lower rates and make arrangements with operating common carriers for moving such cargos. Rate and entry regulation of freight forwarders is similar to that under the Motor Carrier Act.

Thus, expansion of ICC authority has largely paralleled the development of the regulated surface transportation industries. The ICC bears responsibility for assuring an efficient surface transportation system which gives equal treatment to similarly situated shippers using ICC-regulated carriers.

Jurisdiction of the CAB

Congress in 1938 passed the Civil Aviation Act establishing the CAB to promote and develop civil aviation, as well as to regulate certain operations and maintain safety standards in that industry. Notable among the CAB's promotional functions was the authority to subsidize certain air carriers to carry mail and maintain service required for commerce and the national defense.[21]

The market overlaps among all transportation modes were not a compelling consideration then, nor could the great strides in civil aviation of the last two decades be foreseen. Moreover, when CAB jurisdiction was redefined by the Federal Aviation Act of 1958,[22] the developing interrelationship of air transportation with surface modes was not fully appreciated.

The CAB regulates both interstate air transportation and air transport between the United States and foreign countries. It may approve just and reasonable rates, certify carriers, require filing of tariffs, review consolidations, mergers, and interlocks, and prevent unfair competitive practices among air carriers or ticket agents.

Jurisdiction of the FMC

Under the shipping Act of 1916,[23] Congress gave the Shipping Board—from which the FMC evolved in 1961—power to regulate waterborne foreign and domestic offshore carriers. The Alexander report in 1914 [24] had recognized that the American Merchant Marine could not survive the competition and practices of foreign carriers, and that American foreign commerce would be impaired by elimination of weaker competitors and the price instability attending rate wars. To provide protection from and scrutiny over monopolistic practices of oceangoing cartels, Congress passed the Shipping Act to require filing of tariffs, prohibit discrimination, regulate rates and practices in domestic offshore commerce, and prevent rates either so unreasonably high or low as to be detrimental to the foreign commerce of the United States.

The FMC today may approve, under specified statutory standards, exclusive patronage (dual rate) contracts between shipping conferences and shippers,[25] and exempt other agreements from the antitrust laws. The agency can also apply to the Secretary of Commerce to bar foreign carriers which have combined to perform practices forbidden by U.S. laws and make recommendations to the President regarding actions of foreign governments which unfairly discriminate against American carriers.[26]

The Effects of Separate Regulation of the Modes

The consolidation of regulation will help resolve two central conflicts between separate regulation of the transportation modes and the interrelated nature of transportation. Existing regulatory structure, because of its fragmented character and procedures, cannot develop broadly applicable policies to accommodate the interrelationships among the various modes. Specifically, that structure—

- Cannot provide a constructive framework for competition among, and economic growth of the various transportation modes; and
- Prevents realization of the benefits of intermodal business procedures and technologies.

Uncoordinated Response to Competition

Shifting competition among the modes.—Since enactment of the Interstate Commerce Act in 1887, the impact of developments in intermodal competition has been profound.[27] Although competition between trucks, railroads, and domestic water carriers has long existed, extensive competition among buses, railroads, and airlines developed only after the Second World War. Airfreight transport—which has not yet felt the impact of the jumbo jet—increasingly affects traffic in high-value commodities traditionally carried by oceangoing vessel operators and domestic carriers.

There has been a dramatic shift in the amount of intercity passenger traffic from rails to airplanes and buses in the last 25 years (see app. 3–G). Shifts in terms of billions of passenger-miles have correspondingly been reflected in revenue changes (see app. 3–H). For example, intercity passenger revenues of class I railroads decreased in the years 1957–68 from $619.2 to $291 million; while revenues of major buslines grew 50 percent and scheduled domestic airline revenues increased about 275 percent.[28]

Freight patterns, too, have altered significantly (see app. 3–I). In 1940, railroads accounted for 61.3 percent of all ton-miles of intercity freight traffic; by 1968 their share had dropped to 41.2 percent. Truck traffic in the same period increased from 10 to 21.5 percent. Although airfreight is miniscule in terms of the Nation's total traffic, its share has shown a decided upward trend. The availability of large cargo-carrying aircraft will, it is expected, accelerate the growth of airfreight's share.[29]

Effect of separate regulation on competition.—The ICC's jurisdiction now covers about 99 percent of all regulated domestic freight traffic and about 31 percent of regulated passenger transportation (see app. 3–J). But these data mask the underlying competitive struggle between the modes. More and more, each mode competes for some of the traffic carried by others, and one of the bases for this competition is the extent

to which intermodal movements can be efficiently accomplished. That competition is affected by the regulatory decisions of three separate agencies. Jurisdictional disputes among the agencies and actions taken by one without adequate consideration of effects on other regulated modes have impeded healthy economic competition and distorted resource allocations, sometimes in favor of less efficient modes.[30]

An efficient transportation network depends upon establishing rate relationships among carriers to assure the allocation of traffic to those modes with superior economic and technological characteristics. Regulation should channel resources to those modes and carriers which offer the greatest economies and quality of service to the shipper and passenger.[31]

But because of separate regulatory approaches, each mode now generally enjoys a special preference, without sufficient consideration of the effect of isolated, single-mode decisions upon competing carriers. In rate proceedings, for example, the various modes resist competitive encroachments on their traffic, even as to unprofitable or marginally profitable traffic they cannot economically handle.[32] There is a recurring failure to establish rates and other market conditions which would increase the probability that traffic would flow to the mode best suited to provide modern services at the lowest reasonable cost.

These narrowly conceived responses by the separate agencies often take the form of cross-subsidies, promotional rates, and route-strengthening programs, which promote the interest of a particular regulated mode or of a regulated mode over an unregulated mode. As a result, the probability exists that indirect charges may be levied upon consumers or shippers by higher rates in markets where the favored industry has no effective competition, while marginal rates impair competition in other markets.[33] This is precisely what regulation is intended to prevent.

The CAB response.—In the past, the CAB has permitted cross-subsidization in the form of rate adjustments and route awards that allow trunkline air carriers to earn a relatively high rate of return on long-haul operations. High revenue in relation to cost in these areas where the airlines have superior market power makes up for losses or low profits on short-haul services which compete with railroads, buses, and automobiles.[34]

Similarly, by granting route-strengthening awards of profitable long-haul rights to feeder airlines with unprofitable short-haul operations, the CAB has avoided additional direct subsidies to airlines for their short-haul runs.[35]

Though these rate and route awards may have improved the short-haul competitive position of the airlines, such improvement may have been made at the expense of the transportation system as a whole. Deci-

sions of this kind allocate national resources to the airlines, possibly at the expense of other more economical modes.

The idea of preserving an essential service that might otherwise falter is fundamentally sound, and has parallels in the Nation's telecommunications and postal services. There are, however, better means to that end. Approximate, not equivalent, services could be substituted; or assistance might be provided in the form of a direct subsidy rather than a cross-subsidy which may have detrimental spillover effects both within the airline industry and with respect to the transportation system as a whole. In any event, if subsidies of any kind are to be granted, their impact on the Nation's transportation system must be considered with the broadest possible perspective. To the extent that optimal allocation of all resources committed to transportation is made difficult by the narrower perspectives necessarily taken by agencies regulating the individual modes, the prospect fades for a coordinated transportation policy adapted to the overall national interest.

The ICC response.—The ICC also has failed in a number of instances to take into account the inherent economic advantages of one regulated mode over others. The Commission has interpreted the phrase "preserve the inherent advantages of (regulated modes)"—which appears in the National Transportation Policy of the Interstate Commerce Act [36]—as requiring that the Commission protect the existence of such modes. Thus, it has attempted to enforce minimum rate regulation to shield all regulated modes often without sufficient assessment of cost and efficiency factors that might intrinsically favor one or several modes.[37]

Although ICC rate and route disputes invariably discuss costs and rates of return, some decisions result from considerations other than sound economic analysis. Frequently the modes secure and hold traffic by convincing the ICC either that they traditionally carry such traffic or are entitled to a larger share and will lose revenue if a more efficient carrier is permitted to charge a lower rate. These disputes are often resolved by the ICC in favor of high-cost carriers with the result that traffic is shifted from low- to high-cost transportation. This in turn represents a misallocation of the Nation's resources.[38] Moreover, the tendency to resolve rate disputes in this case-by-case manner contributes to decisions based on facts offered by, and factors affecting only the individual carriers who are parties to each proceeding. This approach overlooks the central consideration of which mode is best suited to carry the traffic. Equally important, the approach retards development of a transportation system which fully utilizes the inherent advantages of each mode.

The FMC situation.—The FMC does not have the same degree of control over rates and the conditions of competition as do the ICC and CAB. The international character of merchant shipping precludes control

of rates by the United States. Yet the FMC affects rates in approving rate agreements made by the shipping conferences. At the same time, ICC regulation impacts on FMC decisions since the tonnage of U.S. carriers and of foreign carriers handling American freight is affected by the rates and efficiency of domestic surface carriers moving goods to ports. Thus, the success of merchant shipping is dependent, in part, on actions taken with respect to other modes.

Resulting inefficiencies.—Regulation in its present form leaves the inherent advantages of all regulated modes only partially employed. Shippers, consumers, and the regulated industries must pay for resulting inefficiency and overcapacity. For example, the load factor (percent of capacity use) decreased from 1947 highs of 65 percent for airlines and 57 percent for buses to 1968 lows of 52 and 47 percent respectively (see app. 3–K). While empty seats are not solely attributable to regulatory determinations—indeed, errors in managerial judgment, new high-capacity equipment, changes in disposable income, and other economic influences also bear on load factors—the decisions of the CAB and ICC taken within the narrow frameworks of their specific mandates can have substantial negative effects.

A single transportation regulatory agency would not only be able to help redress this situation by encouraging more efficient resource allocation, but could at the same time give more concerted attention to the effect of regulation both on regulated carriage and unregulated private carriage (see app. 3–J).

Inability To Benefit from Advances in Technology

The existing structure for transportation regulation impedes full realization of the benefits of recent and anticipated technological and procedural innovations in transportation, particularly for intermodal shipments and cargo handling systems. Potential shipper demand for the coordinated services of more than one transportation mode—following on the heels of these innovations—is frustrated by divided regulation.[39]

Containerization.—Since the mid-1950's, striking developments in the handling of cargo have emerged from the concept of containerization (see app. 3–L). Containers provide advantages of speed and economy which were difficult to envision at the inception of the transportation agencies. For example:

> Consider a shipment of 60 cartons of television tubes from a manufacturer's plant in Chicago, Ill., to Zurich, Switzerland. The use of a combination of rail, ocean, and truck services for the plant-to-plant movement would entail a minimum of six transfer operations. The break-bulk shipment thus requires each carton to be individually handled six times, for a total of 360 loadings and unloadings. Obvi-

ously, this method is time consuming, expensive, prone to damage and pilferage, and requires substantial protective packaging.

In a containerized shipment, however, the 60 cartons would be loaded into a 40-foot container at the Chicago plant, transferred four times as a single cargo unit, and finally unloaded at the consignee's plant at Zurich. This method requires only 124 loadings and unloadings, four of which can be accomplished in minutes with special container handling equipment. Shipping time, handling, cost, export packaging expenses, and the risks of damage and pilferage are substantially reduced.[40]

Notwithstanding the potential benefits of containerization and the high capital investment made by the industry for specially equipped vessels, mobile carriage, cranes, and container depots, the fragmented transportation regulatory structure has inhibited intermodal movements.[41] Enlightened transportation management views the intermodal movement of containers as a "closed loop" from point of origin to point of destination and back. But today's regulatory structure can only respond to this system view with compartmentalized jurisdiction and disparate treatment. Thus, despite the advantages of a containerized through shipment, the manufacturer of television tubes in Chicago, in moving his products to Zurich, may find it necessary to use various modes regulated differently by three different agencies; namely, a truck (regulated by the ICC), a railroad (regulated by the ICC), and an oceangoing vessel (regulated by the FMC) or airfreighter (regulated by the CAB).

Proponents of containerization services are convinced that great potential exists for the intermodal use of containers for movement of freight throughout the entire transportation system in both international and domestic commerce. Wide acceptance of containerization can occur only by delineating appropriate roles for motor carriers, water carriers, railroads, airlines, and forwarders, and by coordinating invoice and bill procedures, routing, and ratemaking.

Intermodal freight movements using containers or improved piggyback programs pose complex questions of how best to meet competition for each of the transport modes. Piggyback rates may have important effects on the revenues of the modes publishing the rates, on the competitive position of other modes, on the structure of freight rates, and the timing and cost of shipper movements. What is complex for the industry is made more so when, as now, comprehensive intermodal arrangements are subject to the jurisdiction of all three regulatory commissions.

The Federal Government is involved in promoting transportation technology. It does so through direct subsidy, its own research and development, and through the support it gives to certain modes indirectly. These promotional activities affect the rate and character of the development

of each of the modes, and, in turn, the very factors which the regulatory agencies must consider in determining rates and conditions of competition for each mode. But the Government's efforts should be consciously directed at encouraging the most efficient system possible without regard to modal implications. Insofar as the existing regulatory structure views each mode's competitive position independently, regulatory policy may conflict with that purpose.

Containerization and piggyback movements are by no means the only current technological trends which involve both intermodal considerations and significant interrelationships between regulation and promotion. Of the 25 major trends discussed in a recent publication of the Transportation Association of America, 14 have direct intermodal implications, either because of overlapping jurisdiction or because of competition between modes regulated by different agencies. In addition, 15 involve direct promotion by the Government which in itself suggests the need for consistency of policy between the regulatory and promotional functions (see app. 3–M).

Joint through rates and intermodal tariffs.—Largely because of differing statutory standards and interpretations by the three regulatory agencies, shippers and carriers face a melange of paperwork and a confusion of regulation as to legal rights and duties over a single intermodal shipment. Existing regulation, despite several attempts, has not achieved a system of joint through rates among railroads and oceangoing carriers. Joint through rates are combined rates among carriers over different modes, the sum of which is generally less than the rates charged for non-through movements. These rates, along with intermodal tariff filings with a single regulatory agency, would permit shippers, particularly small shippers, to ascertain the lowest through rates and best service offered by various combinations of carriers.

The ICC and FMC, by rulemaking proceedings, have attempted in the last year to provide for the filing of intermodal through tariffs.[42] But these attempts have not succeeded, only emphasizing the impediments of separate regulation. Such regulation by mode deters the use of joint through rates, even by voluntary action of the carriers. A rate must be filed with the two agencies, subjected to dual challenge, and judged by dual standards. Even commodity classifications and unit measurements for rates on inland and oceangoing segments often vary for the same product. The filing of a joint through rate with the agencies could be accepted by one as reasonable under the circumstances and rejected or suspended by the other.

As long as such ratemaking is subject to different regulatory standards and tribunals, the promise of integrated intermodal traffic for the commerce of the United States will continue to go unfulfilled.

Through bills of lading and carrier liability.—A single transportation agency would also permit development of a through bill of lading—that is, a single bill of lading issued to a shipper by either the originating carrier or another carrier for the entire intermodal movement.

A through bill of lading offers the intermodal shipper marked advantages over issuance of separate bills for each carrier by reducing the paperwork and accounting expense. The shipper negotiates with and pays only one carrier instead of several. Moreover, as the document for payment after receipt from the originating carrier, the through bill could speed payment to exporters on letters of credit.

Largely because of American carriers' efforts, a number of carriers now provide the shipper with a semblance of a through bill of lading. For example, upon receipt of the goods, a railroad may issue a through bill for a single rate from Chicago to Zurich. The railroad will then arrange, subcontract, and pay for the oceangoing and foreign inland segments of the shipment. The shipper commonly deals only with the railroad or other originating carrier for the entire movement.

The problem, however, is that the ICC handles disputes as to rates or services over the domestic inland portion of the movement, while the FMC regulates the ocean segment. Each agency may apply different statutes, regulatory standards, and interpretations with respect to each leg of the movement. Originating carriers under these through bills seldom undertake responsibility for carriage and safety of goods beyond their own segment of the movement. The shipper still must deal with interconnecting carriers about liability for damage or loss, which is subject to possible conflicting agency rules and statutory provisions. The shipper faced with these complexities and uncertainties over liability is generally well-advised to insure his cargo separately, even at the expense of duplicating coverage of the intermodal carrier.

Alternatives to unified regulation.—Halfway remedies will not fulfill the promises of the container age. The trade simplification bill [43] proposed in 1969, is fraught with the same dangers of conflicting interpretations as now exist. Joint agency boards,[44] another suggested remedy, are seldom effective in dealing with problems central to transportation, representing only one more layer of government by committee.

We believe that such efforts will be ineffective because they rely on separate agencies with distinct mandates and constituencies to coordinate activities in the larger but less-delineated general interest. Structures for interagency coordination in the executive branch have been notably faulty even when equipped with legislative mandates from Congress. Louis Kohlmeier, Jr., illustrates this in a recent work:

> A special committee was established and the Coast Guard, Federal Aviation Administration, Maritime Administration, Customs Bureau,

and State Department were called in for consultation. The three [regulatory commission] chairmen finally decided that it was too early to decide whether a Hovercraft was a bus, a boat, or an airplane. They agreed "jurisdictional conflict" should be avoided, but "should jurisdictional problems arise" Congess might have to decide which among them should promote and regulate such vehicles. The Hovercraft determination, preliminary though it was, seems to have been the most substantial accomplishment of the informal get-together approach to transportation coordination.[45]

In our view, a single transportation agency is the most feasible alternative for assuring that the Federal Government performs its role in transportation regulation by balancing the needs of shippers, passengers, and carriers in such a way as to optimize the Nation's commerce.

A single regulatory agency with jurisdiction over all public transportation modes could accept intermodal tariff filings showing the full panoply of rates and services available. Such filings would be subject to a single regulatory standard and would be equally accessible to large and small shippers. Resolute leadership and unified regulation could also encourage simplified documentation and more consistent standards of liability. The single agency could develop a uniform set of rules for nondiscriminatory treatment of all carriers along an intermodal movement. In this way, bureaucratic barriers to traffic among modes can be lessened.

In addition to the single agency, which we have proposed, we have considered other alternatives for improving the structure of transportation regulation. These alternatives are:

- Abolish the ICC, CAB, and FMC, and transfer all regulatory functions to the Department of Transportation.
- Abolish the FMC and CAB, and transfer their regulatory functions to the ICC.
- Consolidate the ICC, FMC, and CAB into one commission made up of the 21 commissioners of the three agencies, or some lower number.
- Abolish the FMC (or consolidate that agency with the ICC) and merge all FMC and ICC regulatory functions in one agency, leaving the CAB in its present, separate form.
- Preserve the existing agencies and establish a board with jurisdiction to determine intermodal questions affecting carriers regulated by the ICC, FMC, and CAB.

(1) *Transfer all regulatory functions to DOT.*—Transferring such functions to an executive department, proposed as early as 1919,[46] would vest in DOT most Federal functions pertaining to transportation, including responsibility for regulation of all modes of transport. The approach would have the advantage of centralizing authority in one man for almost

all Federal promotional and regulatory functions affecting the transportation industry, with attendant gains in efficiency. Transportation would be viewed from a systems perspective which would be represented at the Cabinet level.

But at the same time, transportation regulation would be subject to direct political influence from the administration without adequate checks and balances exercised by the Congress. The plan makes transportation regulation an executive function exclusively, removing the traditional link to the legislative branch. It places an enormous additional task in the hands of one man whose other duties preclude him from acquiring the special knowledge and expertise required. Because regulation requires constant adjustment of the rights of private parties and evenhanded administration in the interest of carriers, shippers, and the public, decisions of this kind should not be the product of expediency or political influence.

Moreover, as discussed in detail later in the chapter, the conflict inherent in both regulating and promoting an industry will lead to compromising both. Promotional programs which aid industry development will often dominate regulatory programs which should balance that development with other vital considerations. The result may well be an imbalance in administration which fails to fulfill the need for evenhandedness in economic regulation.

(2) *Transfer all regulatory functions to the ICC.*—This alternative would also bring within one body the responsibility for regulating all of the public transportation modes and would considerably improve the ability of one agency to coordinate and regulate transportation as a total integrated system. Since the ICC regulates the largest part of the domestic movement of freight [47] and already regulates domestic water carriers, it would be the logical survivor of a simple merger of regulatory functions in this area.

We believe, however, that long-range improvement cannot be made within the framework of any of the existing institutions. Harold Seidman, who has observed the Federal scene from the perspective of the Budget Bureau, has stated:

> Each agency has its own culture and internal set of loyalties and values which are likely to guide its action and influence its policies. * * * Shared loyalties and outlooks knit together the institutional fabrics. * * * Institutional responses are highly predictable, particularly to new ideas which conflict with institutional values and may pose a potential threat to organizational power and survival.[48]

Because the ICC has long been associated with the modes it regulates, it cannot be expected to shift easily to the regulation of modes now within the jurisdiction of the FMC and CAB. While ICC-regulated car-

riers appear generally to favor that agency's continued existence, there is a long-standing fear that the interests of modes now regulated by the FMC and the CAB would not be given appropriate recognition if the ICC were to regulate all the modes.[49]

(3) *Consolidate the ICC, FMC, and CAB into a single 21-member commission or a commission or some lesser number.*—This scheme would also provide for regulation of the modes by a single entity with the attendant benefits previously discussed. The problems of administration created by 21 commissioners, however, would make today's problems of collegial administration pale in comparison. As a result, the benefits of merger would more than likely be lost.

The plan would also permit transition from the existing structure without forcing the resignation of any of the existing commissioners. Such a move would tend to impose a confusion of long-developed commission cultures upon the various carriers, or might otherwise hide the problems of coordination from public view by making them internal to the agency.

Reducing the number of commission members, to five, seven, or 11, for example, would avoid the chaos of trying to work with 21 members. But the underlying defects of the collegial form would remain. For the reasons stated in chapter 1, we believe that retention of the collegial form is ill-advised.

(4) *Merge the ICC with the FMC and leave the CAB in its present form.*—This alternative would provide for increased coordination among the land-based and oceangoing modes which currently account for the bulk of intermodal freight movements. It recognizes the arguments citing the uniqueness of air carriers made at the time the CAB was established and which continue to be made today.[50] Under this structure, through rates and routes could be established by interconnecting water, rail, and motor carriers. These tariffs and combined service arrangements could then be regulated by one agency and subjected to a single set of standards, rules, and interpretations by that agency.

We believe, however, that balanced development of an integrated national transportation system cannot be accomplished rationally in the fragmented form which would result from implementation of this alternative. Air carriers, as indicated earlier, have increasingly entered into competition with buses and railroads for passenger traffic. Moreover, while air freight is at present a very small share of the total intercity freight market, new high-speed aircraft with long-haul and heavy load capacity can be expected to substantially improve the competitive position of air carriers as to freight movement. Thus, the reasons which supported the separation of air transport regulation are no longer persuasive. Transportation regulation requires an organization capable of dealing

with these emerging competitive conditions. Accordingly, any plan which excludes the CAB's regulatory function contains serious imperfections.

(5) *Preserve the existing agencies and establish a board with jurisdiction to determine intermodal questions affecting ICC, FMC, and CAB carriers.*—This approach would seem to alleviate, in part, the problem of regulating intermodal freight movements. Conflicting ICC, CAB, and FMC decisions over intermodal rates, routes, and services could be brought into harmony by the new Board, assuming that the present regulatory statutes were to be modified to permit this. The Board could also resolve conflicting agency decisions on merger or consolidation of two or more carriers governed by different agencies.

Nonetheless, we believe that this alternative would not go far enough in addressing the problems faced by the transportation system. The bulk of decisions of the agencies are not on their face intermodal in nature even though almost all decisions involving ratemaking and certification within a mode may ultimately affect carriers of other modes. Thus, unless the Board reviewed almost all decisions of the three agencies, coordination could not be fully attained. Review of all agency decisions by the Board, representing one more level of regulatory redtape, would place an unnecessary cost in terms of time and money upon the carriers, shippers, and the public. But most important, existence of the Board would further blur regulatory accountability. Foreseeable jurisdictional battles not only among the ICC, FMC, and CAB, but with the new Board, could render hopeless any attempts to obtain rational coordination in the regulation of transportation.

SEPARATION OF REGULATION AND PROMOTION

Apart from consolidating regulation in a single transportation regulatory agency, we believe that achieving effective unified regulation requires that promotional functions be separated from regulatory responsibilities.

A promotional function of government is one which directly seeks to advance or preserve the competitive position of an industry or a segment of it through such activities as direct subsidies or the kind of research which is now being conducted on development of high-speed rail travel and the SST. Both the CAB and ICC have promotional responsibilities for the transportation modes they regulate. The CAB, for instance, grants subsidies to certain air carriers whose services are not self-sustaining but deemed requisite for public convenience and necessity. For fiscal 1969, CAB subsidies to local domestic service carriers totaled $46.1 million.[31]

In addition to its direct subsidy powers, the CAB has a general promo-

tional mandate for "encouragement and development" of an air transportation system for the United States.[52] The Board may implement this statutory charge in its exercise of authority over certification and minimum and maximum rates. Thus, for example, it may in effect promote air passenger service by approving discounts for excursion, charter, and youth fares. Similar indirect subsidy powers over certification and rates are exercised by the ICC in connection with its duty to "preserve a national transportation system" adequate for commerce, the postal service, and the national defense.[53]

To hold a regulatory agency responsible for the development of the industry it regulates distorts its responsibilities to both the industry and the public, making difficult the reconciliation of economic interests among contending parties. It places the agency in the position of advancing interests which fundamentally conflict. Recognition of this inconsistency played an important role in reorganizing the Federal Maritime Board in 1961, when its promotional functions were lodged with the Maritime Administration in the Department of Commerce and its regulatory functions with the present Federal Maritime Commission.[54]

To assist a unified transportation regulatory agency in discharging its regulatory role and to alleviate the inherent conflict between promotion and regulation, we recommend that direct promotional functions of the CAB be transferred to the Department of Transportation. DOT today carries out most government promotional activities in transportation. Within that Department, the Bureau of Public Roads disburses funds for highway construction; the Federal Railroad Administration builds prototypes and provides subsidies for high-speed ground transportation; and the Office of Supersonic Transport Development supervises promotion for the design of a commercial SST. DOT is best equipped by its reponsibilities and expertise to make the priority choices and tradeoffs which are the substance of promotional policy.

Just as direct subsidy-granting authority impairs regulatory responsibilities when both are housed in one agency, similar conflicts arise from the general promotional mandates of the ICC and CAB. These agencies tend understandably to emphasize the interests of the industry they are charged with promoting over the needs of the public for an integrated transportation system. This is in part reflected in route awards and rate adjustments discussed previously. The CAB has been criticized for its use of promotional rates, without consideration of other factors, to attract traffic which might have gone to another mode with lower costs. *In Transcontinental Bus System Inc.* v. *CAB,* the Fifth Circuit Court of Appeals reversed and remanded the CAB's order dismissing the complaints of competing bus companies which challenged airline youth fares, reasoning:

> While the Board is charged with promoting the air transportation industry, it is doubtful, in view of the specific statutory language prohibiting unjust discrimination and undue preference and prejudice, that promotion alone is a sufficient justification for an otherwise unjustly discriminatory rate.[55]

The continuation of promotional responsibility for any one mode would be a contradiction in the mandate of a consolidated transportation regulatory agency. The agency could not fairly balance the interests of all were it charged with the promotion of one.

The question, then, is whether the unified transportation regulatory agency should be authorized to promote and preserve all the modes, or in the alternative to carry out regulatory functions only. We believe that the latter is preferable. Fostering the development of an air transportation system or promoting a surface transportation system is not a necessary part of a regulatory process aimed at assuring the public of the best service at the lowest reasonable rates. The mixing of regulation and promotion tends to satisfy the requirements of neither.[56]

Accordingly, when the statutory language of the various transportation regulatory statutes is amended to make uniform the relationship of the new agency to each regulated mode, we propose that references to fostering, promoting, or preserving the modes be omitted. Such responsibility should be expressly vested in DOT.

We do not mean to imply that the unified regulatory agency ought not consider the carrier's need for revenue in making decisions and rules on rates or operating authority. This is one of the obvious factors involved in any decision as to rates or operating rights. But removing promotional language from the regulatory statutes would serve to emphasize that the agency's primary perspective is the entire transportation system. Its regulatory role is to balance the public's needs with fair and understanding treatment of the regulated carriers.

CONCLUSION

There has been little economic analysis by the regulatory commissions to determine how the Nation can best be served by its transportation network. There could not be, inasmuch as the limited mandates and the judicial environments of these agencies impede such analysis. It is difficult for the Department of Transportation to approach this task in other than piecemeal fashion, for its active cooperation with three regulatory commissions is precluded by a potential conflict of interest arising from the exchange of information and the coordination of policy planning. But the Nation now requires a broad transportation policy and coordinated implementation both of transportation promotion and eco-

nomic regulation. From want of opportunity, not will, the current structure cannot meet these requirements.

Transportation regulation labors under the disaffection of both Congress and the executive branch. The result is inadequacy of direction and accountability. The Nation incurs unnecessary costs as a result of both the fragmented response to national transportation needs and the defects of collegial administration. Yet, no solution to the problems of collegiality and fragmented regulation is likely to emerge until the regulatory structure is substantially redesigned.

Our proposals are not a panacea for all ills affecting transportation today nor are they necessarily the only means for accomplishing the objectives we have in mind. But we believe that they are the best way, on balance, for:

- Dealing with transportation as an integrated system so as to optimize the use of resources committed by the economy to it;
- Insuring the continued services of a viable, privately-controlled industry; and
- Minimizing the cost of transportation regulation to the public and the industry.

These proposals should not be viewed as a recommendation for vesting all transportation regulatory functions in any one of the existing agencies. We contemplate a new structure compatible with a unified regulatory response and modern administrative concepts. Mere clustering of the personnel, responsibilities and approaches of the ICC, CAB, and FMC in one super agency administering an amended Interstate Commerce Act would contravene that intent. It would tend to perpetuate the values and culture of the surviving agency and could make futile any effort at improvement.

Merger of the functions of transportation regulation into a single regulatory agency will place a great burden on the administrator of that organization. At the outset, he would have several statutes to administer, which might tend toward inconsistent policy. This result must be avoided if the agency is to exercise its mandate effectively. Statutes written to accommodate the requirements of the public and the industry in 1887, 1916, or 1938, are not the statutes which can serve the requirements of the integrated transportation network of the Seventies and beyond. For these reasons, the Interstate Commerce Act, the Shipping Act, and the Federal Aviation Act must be reexamined to make compatible their provisions and to determine how best they can be amended for the purpose of enabling private initiative to restore a viable and efficient transportation system.

Because transportation by common carrier is the indispensable conduit of the Nation's commerce, it should be regulated in the public interest.

But regulation to be effective must not impede the industry's development. The complex balancing of interests inherent in all regulatory decisions must consider the underlying need for transportation services which are independent and profitable. Today, these objectives require greater efficiency, recognition in practice of the interdependence of the modes, more coordination within the executive branch, encouragement of technological change, and more anticipatory policymaking than is possible within the existing structure. It is our view that the proposals we have made for structural change will afford the opportunity to achieve these ends.

NOTES

1. See Special Study Group on Transportation Policies in the United States, "National Transportation Policy," Report Prepared for the Senate Committee on Interstate and Foreign Commerce, 87th Cong., First sess. (1961) [hereinafter referred to as Doyle Report]; Hearings before Senate Committee on Government Operations to Establish a Department of Transportation, 89th Cong., Second sess., pt. 1, at 39 [hereinafter referred to as DOT Senate hearings (1966)]; L. Kohlmeier, Jr., "The Regulators" 175 (Harper & Row, New York City, 1969) [hereinafter referred to as Kohlmeier].

2. See M. Bernstein, supra pt. I, note 3, at 222; Kohlmeier, supra note 1, at 173; Hector supra ch. 2, note 1.

3. Bernstein, supra pt. I, note 3, at 104–105; Nader report on the ICC, supra ch. 1, note 1, at 311. See generally, sources cited supra ch. 1, note 1.

4. Address by Secor D. Browne, annual meeting of the Association of Interstate Commerce Commission Practitioners, in Louisville, Ky., June 19, 1970. Also see address by George M. Stafford, Chairman, ICC, District No. 1 chapter Association of Interstate Commerce Commission Practitioners, in Boston, Oct. 14, 1970, asserting a need to shift away from overjudicialization.

5. Pursuant to section 17(6) of the Interstate Commerce Act, 49 U.S.C. 17(6) (1964), the ICC has d[illegible]ated much of its review of cases before the agency to three divisions headed by th[illegible]e commissioners each. The Commission is also empowered to delegate certain of its functions to individual commissioners and to boards consisting of not less than three eligible ICC employees. The entire Commission is required, however, to hear, either initially or on appeal, all cases in which an issue of national transportation importance is raised.

6. See, e.g., Report of Federal Coordinator of Transportation, 1934, (3d report), H. Doc. 152, 73d. Cong., Second sess. (1935); C. Dearing and W. Owen, "National Transportation Policy" (Brookings Institute, 1949); Doyle report, supra note 1.

7. Doyle report, supra note 1, at 93.

8. Report of Presidential Advisory Committee on Transport Policy and Organization 1 (press release, Apr. 18, 1955).

9. Hector, supra ch. 2, note 1, at 949.

10. See generally DOT Senate hearings, supra note 1.

11. DOT Senate hearings, supra note 1, at 154. In the same hearings, Charles Schultz, former Director of the Bureau of the Budget declared: "We urgently need organizational arrangements through which transportation needs and programs can be evaluated as a whole and coordinated national transportation policies developed." Id. at 79.

12. See, e.g., address by Secor D. Browne, Chairman, CAB, before the American

Airlines Board of Directors and Freight System Advisory Board, in New York City, Mar. 17, 1970.

13. See G. Rhyne, "The Civil Aeronautics Act Annotated" (National Law Book Co., Washington, D.C., 1939).

14. 49 U.S.C. 1–27 (1964), as amended (supp. IV, 1965–68).

15. 49 U.S.C. 15 (1964).

16. 49 U.S.C. 1 (3) (a) (1964), as amended (supp. IV, 1965–68).

17. 49 U.S.C. 301–327 (1964), as amended (supp. IV, 1965–68).

18. 49 U.S.C. 303 (b) (1946), as amended (supp. IV, 1965–68).

19. 49 U.S.C. 901–923 (1964), as amended (supp. IV, 1965–68).

20. 49 U.S.C. 1001–1022 (1964), as amended (supp. IV, 1965–68).

21. 49 U.S.C. 1376 (1964).

22. 49 U.S.C. 1301–1542 (1964), as amended (supp. IV, 1965–68).

23. 46 U.S.C. 801–842 (1964).

24. House Committee on Merchant Marine and Fisheries, report on "Steamship Agreements and Affiliations in the American Foreign and Domestic Trade," H.R. Doc. No. 805, 63d Cong., Second sess. (1914).

25. 46 U.S.C. 813a (1964).

26. 46 U.S.C. 825 (1964).

27. See generally Secretary of Commerce, "Issues Involved in a Unified and Coordinated Federal Program for Transportation" 41–42 (1949); Associated Traffic Clubs of America," Reorganization of the Federal Agencies of Transportation Regulation" 34–35 (1934).

28. ICC Bureau of Economics, "Transportation Economics, Monthly Comment" 15 (Jan. 1970).

29. See Transportation Association of America, "Transport Technological Trends" 3 (second ed. 1970).

30. See generally Doyle report, supra note 1.

31. See R. Harbeson, "Toward Better Resource Allocation in Transport," 12 J. Law. Econ. 321 (1969); R. Harbeson, "Recent Trends in the Regulation of Intermodal Rate Competition in Transportation," 42 Land Econ. 315 (1966).

32. Id.

33. See D. Turner, "The Scope of Antitrust and Other Economic Regulatory Policies," 82 Harv. L. Rev. 1207, 1235 (1909).

34. See generally A. Silberman, "Price Discrimination and Regulation of Air Transportation," 31 J. Air L. & Com. 198 (1965).

35. See Supplemental Opinion and Order on Reconsideration, Reopened Pacific Northwest-Southwest Service Investigation, CAB docket 15459 (Oct. 31, 1969); Supplemental Opinion and Order on Reconsideration, Service to Albuquerque Case, CAB docket 18586 (Sept. 18, 1969); Supplemental Opinion and Order on Reconsideration, CAB docket 17726 (Sept. 3, 1969).

36. 49 U.S.C. prec. 1 (1964).

37. See Ingot Molds From Pennsylvania to Steelton, Ky., 326 ICC 77 (1963); Grain in Multiple Car Shipments—River Crossings to the South, 321 ICC 590 (1962); Tobacco—North Carolina to Central Territory, 309 ICC 347 (1960). The ICC has not taken the same protective attitude regarding the preservation of unregulated carriers. See Coal from Southern Mines to Tampa and Sutton, Fla., 318 ICC 371 (1962). See generally Nader Report on the ICC, supra ch. 1, note 1, at 143–54.

38. D. Doies, Jr., "Experiment in Mercantilism: Minimum Rate Regulation by the Interstate Commerce Commission," 68 Colum. L. Rev. 599, 663 (1968).

39. See America's Sound Transportation Review Organization, "The American Railroad Industry 31 (Washington, D.C., 1970); Remarks of Senator Baker introducing S. 3760, 91st Cong., Second sess., in 116 Cong. Rec. 2988 (daily ed., Apr. 2, 1970); The Wall Street Journal, July 6, 1970, at 6.

40. Note, "Legal and Regulatory Aspects of the Container Revolution," 57 Geo. L. J. 553, 535 (1969).

41. J. Frederick, "Improving National Transportation Policy" 16–17 (American Enterprise Inc., Washington, D.C., 1959).

42. FMC General Order 13 (amendment 4) Filings of Through Rates and Through Routes (1970); ICC Ex Parte No. 261, Tariffs Containing Joint Rates and Through Routes, 337 ICC 649 (1970), effective date postponed to permit reconsideration, ICC order, Oct. 22, 1970.

43. H.R. 14489, 91st Cong., First sess. (1969).

44. See, e.g., Federal Aviation Act of 1958, 49 U.S.C. 1483 (1964) (CAB and ICC joint board); S. 2451 (1959).

45. Kohlmeier, supra note 1, at 171.

46. Hearings on H.R. 4378 before House Committee on Interstate and Foreign Commerce, 66th Cong., First sess., vol. 3, at 3315–16 (1919).

47. See Transportation Association of America, "Transportation Facts and Trends" 8, 16 (7th ed. 1970).

48. H. Seidman, "Politics, Position and Power" 18 (Oxford University Press, New York City, 1970).

49. See Associated Traffic Clubs of America, supra note 27, at 36.

50. 83 Cong. Rec. 6746–6748, 6754, 6850, 7065; hearings on H.R. 5234; address by Stuart G. Tipton, president, Air Transportation Association of America, before American Transportation Association in Washington, D.C., Dec. 1, 1970.

51. Hearings on Department of Transportation and Related Agencies appropriation for 1971 before a subcommittee of the House Committee on Appropriations, 91st Cong., Second sess., pt. 1, at 1194 (1970).

52. 49 U.S.C. 1302 (1964), as amended (supp. IV, 1965–68).

53. 49 U.S.C. 27 (1964), as amended (supp. IV, 1965–68).

54. Reorganization plan No. 7 of 1961, 26 F.R. 7315 (1961).

55. 383 F. 2d 466, 490 (5th Cir. 1967).

56. Special message of President John F. Kennedy to the Congress, Transmitting Reorganization Plan 7 of 1961 (June 12, 1961).

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CHAPTER 4

Trade

PROPOSAL

That the Federal Trade Commission be abolished and its consumer protection responsibilities vested in a new Federal Trade Practices Agency headed by a single administrator. That antitrust enforcement responsibilities of the FTC be transferred to a new Federal Antitrust Board.

Policing anticompetitive business activity is a large and demanding task. When combined with the pervasive responsibility for protecting consumers against unfair and deceptive trade practices, neither mandate is well-served. This conclusion is evidenced by recent studies and commentary relating to the Federal Trade Commission [1] (see app. 4–A). Much of the criticism of the FTC is aimed at its disproportionate attention to comparatively trivial matters [2] (see, e.g., app. 4–B)—resulting largely from the breadth of its mandate and compounded by inherent deficiencies of the collegial form of organization. Preoccupation with minutiae over the years has created a "jack of all trades—master of none" profile for the FTC.

THE FTC'S DUAL ROLE

The FTC is burdened with an ill-mix of functions competing for agency resources. What began with direction, is now virtually aimless.[3] The Commission was set up in response to widespread concern over anticompetitive business activities which threatened free enterprise. The

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Sherman Antitrust Act,[4] enforced by the Department of Justice, had been interpreted by the Supreme Court to proscribe only "unreasonable" restraints of trade.[5] It did not prevent acquisitions which amounted to incipient monopolies, but only acquisitions which were plainly monopolistic in intent and effect.[6]

Unsuccessful attempts were made to contain .nonopolistic practices by public disclosure of investigations by the Bureau of Corporations, a unit created during the administration of President Theodore Roosevelt in 1903.[7] Anticompetitive practices and concentration of industrial power reached such a level by 1912 that candidates for the Presidency from both major political parties called for further remedial legislation.[8]

In 1914, Congress passed the Federal Trade Commission Act [9] and the Clayton Act,[10] the former creating a new regulatory agency to augment enforcement against "unfair methods of competition in commerce." [11] The FTC was to consist of a chairman and four commissioners, appointed by the President upon advice and consent of the Senate, to serve staggered 7-year terms, with no more than three commissioners from the same political party. The agency was empowered to enjoin unfair methods of competition by issuance of cease and desist orders, to conduct broad industry investigations aimed at uncovering anticompetitive practices, and to study the economy in general.

The FTC was also given concurrent jurisdiction with the Department of Justice to enforce provisions of the Clayton Act prohibiting tying and exclusive dealing arrangements, acquisitions which tend to lessen competition or create a monopoly, and certain interlocking directorates involving financial institutions.[12]

The Commission acquired further antitrust jurisdiction with the passage of the Robinson-Patman Act.[13] The depression of the 1930's had resulted in the bankruptcy of many small businessmen and challenged the survival of the small entrepreneur. These businessmen were further jeopardized by their inability to compete with large companies. Chain stores, for example, were able to negotiate lower prices and other concessions from suppliers while smaller businesses, without sufficient market power, could not. The Robinson-Patman Act amended section 2 of the Clayton Act to prohibit certain price discriminatory practices. Over the years, the FTC has shouldered responsibility for enforcing that legislation, notwithstanding concurrent jurisdiction in the Justice Department.

Congress subsequently invested the Commission with many diverse responsibilities not directly related to its antitrust role. Beginning in 1938, authority for direct consumer protection was entrusted to the FTC. The need for such additional protective legislation was demonstrated by the case of *FTC* v. *Raladam,*[14] in which the Supreme Court held that a practice which did not cause injury to competition was not prohibited by the

Federal Trade Commission Act, even if there was deception of the consuming public. Congress later extended the act to proscribe "unfair or deceptive acts or practices in commerce," and thereby conferred upon the FTC expanded jurisdiction over misrepresentation in advertising and other business practices.[15]

Additional duties pertaining to consumer protection have been placed with the FTC through the years, such that the agency is responsible for:

- Regulating export trade associations formed solely to engage in foreign commerce (Export Trade Act) (1918);[16]
- Investigating certain monopolistic, unfair, unjustly discriminatory, or deceptive practices in the meat and poultry packers industry (Packers and Stockyards Act) (1921, and amended in 1958);[17]
- Preventing commerce in misbranded wool products which do not disclose inferior substances (Wool Products Labeling Act) (1940);[18]
- Policing registered trade marks and certification marks primarily for restraints of trade, fraud, and misleading use (Lanham Trade Mark Act) (1946);[19]
- Preventing misbranding, false advertising and false invoicing of furs (Fur Products Labeling Act) (1951);[20]
- Preventing commerce in fabrics so highly flammable as to be dangerous when worn (Flammable Fabrics Act) (1953, and amended in 1967);[21]
- Preventing misbranding and false advertising of textile fiber products (Textile Fiber Products Identification Act) (1958);[22]
- Policing statements made on cigarette labels by manufacturers, as well as current practices and methods of cigarette advertising and promotion concerning the health of the consuming public (Federal Cigarette Labeling and Advertising Act) (1965);[23]
- Prohibiting unfair and deceptive packaging and labeling of consumer commodities (Fair Packaging and Labeling Act) (1966);[24]
- Requiring adequate disclosure of deferred payment terms to assure informed consumer selection and use of credit (Truth-in-Lending Act) (1968).[25]

Consequently, the Commission now addresses itself to a plethora of duties ranging from complicated antitrust cases to the labeling of textiles. These duties are aimed at fulfilling two broad purposes: the preservation of competition through the prevention of anticompetitive practices and the protection of consumers through the prevention of unfair trade practices.

Consequences for Collegial Administration

The FTC's breadth of jurisdiction has contributed to a distortion of priorities and, as a consequence, to a misallocation of agency resources. It has fostered mishandling of routine matters ordinarily best resolved through informal rulemaking, investigations, or expedited procedures.[26] In addition, the impediments and limitations inherent in collegial administration have accentuated those flaws.

The recent American Bar Association report on the FTC criticizes the allocation of agency resources:

> Operations of the Bureau of Textiles and Furs (other than in Flammable Fabrics Act enforcement) represent a glaring example of misallocation of resources and a misguided enforcement policy. Each year larger allocations are requested and increasing amounts spent on an energetic program to achieve results of highly dubious value to anyone. Moveover * * * trivial labeling errors [come] up in enforcement actions * * * We suspect—and several of the present Commissioners in the FTC support us in this view—that even more trivial violations are involved in enforcement through voluntary compliance procedures.[27]

At the same time, the ABA report notes that FTC enforcement activity relating to mergers has been inappropriately deemphasized:

> In terms of a percentage of its total budget, the FTC was spending in 1968 and 1969 about one-half as much on merger enforcement as it had been spending in 1959. This reduction took place during a period when the United States, according to the FTC's own Bureau of Economics, was undergoing the greatest surge of merger activity in its history.[28]

The collegial form of the FTC has permitted differences among commissioners and between commissioners and staff, causing delay and foreclosing attempts to set priorities and guidelines.[29] The collegial form also impedes the adequate use of rulemaking, advisory opinions, and indepth economic analysis. The Commission prefers instead to set policy through case-by-case review of agency proceedings. Apropos of this, former Commissioner Philip Elman has observed:

> Case-by-case adjudication of alleged violations of law has proved to be inefficient and ineffective, and, in many cases, unfair. Litigation is an excessively slow, expensive, clumsy, and inadequate process for resolving technical and complex economic issues. Yet, agencies like the Federal Trade Commission—staffed as they are by lawyers whose training and experience make them feel most comfortable with procedures drawn from the courts—continue to rely on adjudication as a policymaking technique where other quasi-legislative methods, principally rulemaking, are far more efficient, expeditious, and advantageous to the public.[30]

Other criticism of the FTC relates to the competence of commissioners and staff.[31] In part, however, the Commission's inability to discharge its statutory responsibilities properly may be due to a lack of executive and congressional support in obtaining sufficient appropriations and personnel strength (see app. 4–C, tables 1, 2, and 3). Problems centering on effectiveness of enforcement and quality of the enforcement staff of the FTC have been magnified because of the requirement that Justice Department attorneys handle various FTC cases tried in the Federal District Courts.[32] Furthermore, the enforcement staff often has not followed up on compliance with cease and desist orders [33] (see also app. 4–D). Even where the staff is reasonably diligent, enforcement investigations and civil penalty suits take a tortuous course.

While some improvement in the FTC has resulted from recent internal reforms, more substantial remedial measures are required to cure underlying organizational flaws. We also recognize that existing problems may signal a need for comprehensive review of the Commission's substantive authority with a view toward corrective legislation.

EFFECTIVE ADMINISTRATION THROUGH SEPARATE ENFORCEMENT

In our view, the Government should be organized around the broad and substantial purposes it seeks to fulfill. These purposes change from time to time such that today a broad new purpose of government has emerged—that of insuring that consumers are protected against defects in products and improper business practices that the momentum of our economy makes inevitable.

When combined within one agency, two distinct purposes tend to work at cross-purposes. They vie for agency resources. Programs, funding, and commissioner and staff energies must be juggled to accommodate the equally important regulatory objectives, each deserving singular attention. The melding of antitrust enforcement and consumer protection activities in the FTC obscures each and detracts from the efficacy of both. Accordingly, we recommend abolishing the FTC and transferring its antitrust enforcement responsibilities to a new Federal Antitrust Board and its consumer protection activities to a new Federal Trade Practices Agency.

Distinctions in the administration and enforcement of these two jurisdictional mandates indicate that the laws presently enforced by the FTC would be better served by separate units. Antitrust cases are usually long and complex; most consumer protection disputes are generally less complicated and capable of more expeditious resolution through informal procedures. Even though more policy formulation through informal rule-

making is needed, antitrust matters are often appropriately dealt with on a case-by-case basis while consumer protection problems are more readily amenable to resolution by rules and regulations. Antitrust violations may result in agency decisions mandating changes in industry structure while consumer protection violations usually involve imposition of less consequential sanctions. Finally, whereas the kind of economic analysis necessary to monitor anticompetitive activity is best performed by a highly specialized, central agency, consumer protection generally involves field investigations that can and should be conducted by regional offices.

Separate agencies also would provide organizational forms more attractive to highly qualified administrators and staff. The Federal Antitrust Board would attract antitrust experts and economists to pursue their concerns without diversion by consumer protection matters. Consumer protection experts would be attracted to the new Federal Trade Practices Agency knowing that the full force and direction of the agency would be oriented to consumer protection activities. A single, clear mandate for each area of responsibility would tend to heighten the interest and response of agency personnel.

The Federal Trade Practices Agency

Single Administrator

All consumer protection responsibilities now within the jurisdiction of the FTC should be transferred to the proposed Federal Trade Practices Agency. The agency should be headed by a single administrator, nominated by the President, confirmed by the Senate, to serve at the pleasure of the President. Accountability would be lodged in one identifiable individual. The administrator should be empowered to promulgate rules and regulations, prosecute violations of agency statutes, review within 30 days, on his own motion, determinations of hearing examiners for consistency with agency policy, and manage staff and budgetary matters.

FTC field offices should be transferred to the trade practices agency. The administrator should delegate authority to the field offices to handle many consumer protection cases, giving field directors broad discretion and responsibility for the performance of those offices. The agency administrator should coordinate field activities and take part directly in those cases which affect nationwide consumer interests.

Adjudication

FTC consumer protection suits for cease and desist orders are presently tried before agency hearing examiners, with appeals from examiners' decisions to the full commission, appropriate U.S. Courts of Appeals, and then to the Supreme Court. Adjudication of all other FTC matters—temporary injunctions, seizures, and enforcement of orders and sub-

poenas—is in Federal district courts, with appeals to Courts of Appeals, and then to the Supreme Court.

We propose that the Federal Trade Practices Agency employ the same method of adjudicating consumer protection cases, except that examiners' decisions would only be subject to a limited policy review by the administrator prior to appeal to appropriate Courts of Appeals.

It is advisable to continue to use agency hearing examiners in cease and desist suits, rather than initially adjudicate such cases in the courts. Hearing examiners situated in regional offices can informally and expeditiously resolve many consumer protection disputes. Moreover, consumer protection problems frequently involve limited sums of money and thus are susceptible to settlement or compliance procedures prior to the commencement of formal proceedings,[34] or may best be resolved by arbitration instead of complex and costly adjudication in Federal courts.

Consumer Protection Legislation

As the Federal Trade Practices Agency proves effective in enforcing those statutes initially within its jurisdiction, it may be desirable to assign to it additional Federal legislation for the protection of consumers. Some existing statutes, administered by the Department of Agriculture, the Department of Commerce, and the Food and Drug Administration of the Department of Health, Education, and Welfare, should be studied to determine whether they might better be enforced by the Federal Trade Practices Agency. New consumer legislation, particularly that dealing with consumer advocacy might also be properly placed in that agency. All this would further the establishment of a single, strong agency to represent consumer interests which are wrongly infringed upon, while eliminating difficulties associated with overlapping efforts.

The Federal Antitrust Board

Though there are good reasons for placing all antitrust enforcement in one agency, we favor maintaining dual jurisdiction between the Department of Justice and the proposed Federal Antitrust Board. In antitrust matters, the FTC has concurrent jurisdiction with the Department of Justice to enforce sections 2, 3, 7, and 8 of the Clayton Act.[35] Additionally, under section 5 of the Federal Trade Commission Act, the FTC can enjoin business activities also prohibited by the Sherman Act (enforced by the Justice Department).

A separate agency, with its total resources focused solely upon antitrust considerations, would be able to attain a high level of expertise, particularly in the area of developing and supplying indepth economic analysis of issues which may be or are involved in antitrust matters. In addition to having its own economists available, the agency would have

broad investigative powers with authority to require submission of reports and to subpoena documentary information without the necessity of initiating formal litigation.

This fact-finding ability could result in the issuance of advisory opinions and industry guidelines which should lessen litigation and the tendency to handle all matters on a case-by-case basis. It would make possible a valuable service to the business community, the President, Congress, and the public through the release of studies and reports of findings.

The existence of two enforcement agencies permits a division of the workload and an assignment of cases based on the special expertise and perspectives of each. In this regard, agreements which now exist between the Justice Department and the FTC should be examined and continued where appropriate to avoid needless confusion. We propose establishment of the separate Federal Antitrust Board only after carefully considering the alternative of vesting all authority for antitrust enforcement in the Department of Justice. Although this alternative would probably result in increased consistency of policy, elimination of overlapping efforts, and possible cost reductions, we have concluded that the advantages of dual enforcement and the intensive economic analysis available through the Antitrust Board should be maintained and developed still further.

Our perceptions of antitrust enforcement centered around the need for assuring sufficient economic application of micro- and macroeconomic analysis of the implications of business practices. We examined the various alternatives—from a single administrator to a commission—to determine which would provide the best organizational form to achieve that objective. On balance, we concluded that significant improvements in antitrust enforcement would be gained only by providing a form which must draw upon the expertise of various economic perspectives. In particular, antitrust policies should be related to the broad economic goals of the Nation, and that result can best be achieved by institutionalizing the counsel and advice of a highly placed government economist having direct access to the Council of Economic Advisers.

We believe that an interchange of economic views and data is imperative in all agency deliberations concerning antitrust matters. Thus, we have recommended a form which is neither a commission nor a single administrator, but combines some of the advantages of each.

The Antitrust Board should consist of a chairman and two economic administrators. Although we have departed from the single administrator form to a degree in proposing this structure, we believe the chairman would enjoy most attributes of agency leadership necessary for effective regulation. He would be accountable, by statute, for the direction and

operation of the Board. He would be responsible for all executive and administrative duties, have ultimate responsibility for articulating the Board's policies, and would act as the spokesman for the agency. With this degree of responsibility and authority, the chairman would possess much the same authority as a single administrator, sharing responsibility with the two economic administrators only in policy deliberations.

One economic administrator would direct the research and operation of the Board's economic analysis bureau. He would staff the bureau, carry out the Board's requirements for economic investigation and analysis, and report findings, analyses, and recommendations to the chairman. He would also participate in Board deliberations concerning broad policy matters and specifically advise the chairman, pursuant to direct statutory mandate, on particular proceedings.

A second economic administrator, a member of the Council of Economic Advisers, would provide economic advice to the chairman. He would join in Board deliberations on matters of broad policy and would specifically advise the chairman on particular investigations and proceedings based on his perspective as a member of the CEA. He would provide the agency with a view of the relationships between antitrust considerations and the national economy. He would devote only part-time to these responsibilities, and his duties would be consonant with his primary responsibility as an adviser to the President.

In addition to providing important aspects of leadership to those areas of antitrust enforcement now exercised by the FTC, this composition of the Federal Antitrust Board would (i) serve as a mechanism for concentrated, expert economic advice and data for the Board, the Department of Justice, and the affected industries, (ii) merge considerations of economics and law in establishing policy and deciding particular cases, and (iii) assure that antitrust enforcement policies are consistent with the broad and long-range economic interests of the Nation.

The chairman and one economic administrator would be nominated by the President, confirmed by the Senate, and would serve at the pleasure of the President. The President would also designate the member from the CEA.

CONCLUSION

If implemented, the proposal to separate the dual roles of the FTC will allow, for the first time, effective pursuit of the distinct purposes of each. The single administrator of the Federal Trade Practices Agency should help to eliminate those defects inherent in collegial administration as they relate to consumer protection matters. That agency would be, in our view, an appropriate organization to which Congress might assign consumer protection legislation that may from time to time be enacted and transfer

responsibilities which now reside in departments of the executive branch. The very existence of an agency devoted to this evolving function of government should give to the consumers of the Nation a voice which has either been lacking heretofore or has been muffled by the fragmentation of Government responsibilities.

NOTES

1. See Statement by P. Elman, "Administrative Reform: The Federal Trade Commission," Responses to Questionnaire on Citizen Involvement and Responsive Agency Decisionmaking 122 (Judic. Comm. print 1969) (hereinafter referred to as Elman response); Nader report on the FTC, supra ch. 1, note 1.

2. G. Henderson, "The Federal Trade Commission" 337 (Yale University Press, New Haven, 1924) (hereinafter referred to as Henderson); "First Hoover Commission Report," supra pt. I, note 4, at 125, 128; C. Auerbach, "The Federal Trade Commission," 48 Minn. L. Rev. 393 (1964); Elman, supra note 1, at 145–149; Nader report on the FTC, supra ch. 1, note 1, at 44–48, 165–166.

3. Elman response, supra note 1, at 149.

4. 15 U.S.C. 1–7 (1964).

5. *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911).

6. *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U.S. 346 (1922).

7. See H. Thompson, "Highlights in the Evolution of the Federal Trade Commission," 8 Geo. Wash. L. Rev. 258 (1940); Henderson, supra note 2, at 19.

8. See Thompson, supra note 7, at 259.

9. 15 U.S.C. 41–58 (1964).

10. 15 U.S.C. 12–27 (1964).

11. 15 U.S.C. 45 (1964).

12. 15 U.S.C. 14, 18, 19 (1964).

13. 15 U.S.C. 13, 13a, 13b, 21a (1964).

14. *FTC* v. *Raladam,* 283 U.S. 643 (1931).

15. 52 Stat. 111 (1938).

16. 15 U.S.C. 61 (1964).

17. 7 U.S.C. 181–229 (1964).

18. 15 U.S.C. 68 (1964).

19. 15 U.S.C. 1051–72 (1964).

20. 15 U.S.C. 69 (1964).

21. 15 U.S.C. 1191 (supp. IV, 1965–68).

22. 15 U.S.C. 70 (1964).

23. 15 U.S.C. 1331–1339 (supp. II, 1965–66).

24. 15 U.S.C. 1451–1461 (supp. II, 1965–1966).

25. 15 U.S.C. 1601–1665 (supp. IV, 1965–68).

26. See "First Hoover Commission Task Force Report," supra pt. I, note 6, at 125, 128; Elman response, supra note 1, at 164–172.

27. "Report of the ABA Commission To Study the Federal Trade Commission" 48 (1969) (hereinafter cited as ABA report).

28. Id. at 27.

29. See id. at 35–36.

30. Address by Elman, supra ch. 1, note 1.

31. See, e.g., R. Posner, "The Federal Trade Commission," 37 U. Chi. L. Rev. 47 (1969); these criticisms have been repeated in virtually every study of the FTC see Henderson, supra note 2 at 328; "First Hoover Commission Task Force Report,"

supra pt. I, note 6, at 119, 125; Elman response supra note 1 at 186–188; ABA report, supra note 27, at 9–11, 32–33; Nader report on the FTC, supra ch. 1, note 1, at 129–159.

32. See, e.g., *FTC* v. *Guignon*, 390 F. 2d 323 (8th Cir. 1968). To remedy this situation, a bill was introduced in the 91st Cong., Second sess. (S. 3201).

33. See ABA report, supra note 27, at 25.

34. See FTC, "Quarterly Workload and Manpower Reports," "Assurances of Voluntary Compliance," and "Informal Corrective Actions" (1963–70).

35. 15 U.S.C. 21 (1964).

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CHAPTER 5

Securities

PROPOSAL

That the Securities and Exchange Commission be transformed into a Securities and Exchange Agency headed by a single administrator. Regulatory responsibilities under the Public Utility Holding Company Act should be transferred to the power agency.

While the basic functions of the Securities and Exchange Commission have not changed since 1940, the work of the Commission has grown and changed dramatically (see apps. 5–A, 5–B, 5–C, 5–D, and 5–F), corresponding to changes in the nature of the securities industry. From the Commission's inception in 1934—when Bethlehem Steel made a public offering rather than a private placement of a bond issue and thus became the first major corporation to file a registration statement [1] under the Securities Act of 1933 [2]—filings have increased to the extent that 3,645 registrations were processed in fiscal year 1969 (see app. 5–A). Dollar value of securities registered under the 1933 Act increased more between 1966 and 1969 than in the preceding 32 years, approaching $87 billion in 1969 (see app. 5–A).

As the pace of securities activity accelerated during the last two decades, new problems have arisen. The SEC and the securities industry are confronted with the growth of old and the development of new classes of institutional investors possessing unparalled investment sophistication and market strength. Increases in trading volume have caused severe back-office problems for brokerage houses in their handling of securities and customers' funds, as well as tieups in the transfer of securi-

ties by stock exchanges. New methods of financing have evolved, along with the growth of conglomerates and mutual funds. The use of computer systems and other automation techniques to keep up with the volume of exchange and over-the-counter stock activity has generated difficulties yet unresolved. These problems have been exacerbated by financial instability in some brokerage firms.

Finally, serious questions have been raised regarding the level and structure of commission rates,[3] the issuance of debt and equity securities to the public by members of securities exchanges,[4] and the advisability of one national securities exchange.[5]

In addition to the increasing demands to respond to these developments, Commission attention is diverted by tangential duties pertaining to the structure of the electric power and natural gas industries under the Public Utiilty Holding Company Act.[6]

All of these conditions impair the ability of the SEC to continue to perform its stated mandate.

RESPONSIBILITIES IN A CHANGING INDUSTRY

The SEC was created during this country's most severe depression. By 1933, the stock market and the national economy were at their lowest ebb. Half of the securities issued since the end of the First World War had become worthless.[7] Resulting Federal legislation, the Securities Act of 1933, directed the Federal Trade Commission to provide for adequate disclosure to prevent fraud and deception in the issuance of securities. The Securities and Exchange Act of 1934 [8] transferred that responsibility to a new Securities and Exchange Commission and also proscribed fraud and deception in the trading of securities.

In 1935, as a result of a study by the Federal Trade Commission, Congress enacted the Public Utility Holding Company Act, assigning jurisdiction to the SEC. Under the Trust Indenture Act of 1939,[9] the Commission was given additional authority to protect holders of debt securities and to prevent indenture trustees from avoiding liability under corporate indentures. The Investment Company Act [10] and Investment Advisers Act,[11] both passed in 1940, are also administered by the SEC. The former provides for regulation of the organization and procedures of investment companies, while the latter prohibits certain deceptive practices of investment advisers.

The 1933 Act, the 1934 Act, and the Trust Indenture Act forbid the sale of securities not properly registered or qualified with the SEC. The Commission reviews various documents—to be distributed or made available to prospective purchasers in connection with an offering or for trading purposes—to determine compliance with disclosure standards

set forth in agency statutes, rules, and regulations. The SEC may block issuance of securities under inadequate registration statements, enjoin distribution of unregistered securities, and recommend prosecutions for criminal violations of the securities laws.

Other significant functions of the SEC include determining under the 1934 Act the reasonableness of commissions charged by exchange members and approving registrations under the Investment Company Act. It also performs those functions common to all regulatory agencies, such as collecting statistical information, developing agency rules and regulations and proposing legislation to Congress. Presently, the Commission consists of five members, appointed by the President with the advice and consent of Congress, to serve 5-year staggered terms. The President, by statute, designates the chairman.

In carrying out its statutory responsibilities, the SEC employs methods different from those used by the other regulatory agencies. Except for exchange member charges, the Commission generally does not establish rates. Its power to exclude would-be members of the securities industry is premised on the need to protect the public from unscrupulous or underfinanced operators rather than the control of competitive forces through entry restrictions. The SEC may issue orders to suspend trading on exchanges and to suspend or revoke registration statements. The Commission may also institute actions in the Federal courts to enjoin violations of the 1933 or 1934 Acts, deceptive practices, market manipulation, or any device or scheme to defraud in the offer or sale of a security.

The SEC's authority most resembles that of a prosecutor insofar as it investigates, negotiates, and litigates as a matter of course, although it does also undertake to make binding determinations on the merits in particular cases. While there is no statutory requirement that private placements be filed with the SEC, it is common practice to submit unusual or questionable proposals for such placements to the SEC staff to obtain no-action letters indicating that registration is not required and that no enforcement action will be instituted.

The SEC has also developed informal procedures for handling complaint cases. If a purchaser feels that he has been injured by a violation of any securities law, the SEC may investigate his complaint and take formal or informal action as appropriate. In 1969, the SEC received over 12,000 such complaints.[12]

Failure to comply with informal SEC advice can have adverse effects. Generally, underwriters, broker-dealers, and the public refrain from selling or trading in the securities of, or dealing with a company that risks SEC censure or suit. Moreover, private actions are often encouraged by an indication of Commission displeasure.

Between 1935 and 1969, the Commission itself instituted 2,093 civil cases in the Federal courts; at the end of fiscal 1969, 181 such cases were pending.[14]

A CAPACITY FOR RESPONSE

The SEC is regarded as one of the ablest of the independent regulatory commissions. Despite limitations arising from its independent status and the disabilities of its collegial composition, we believe the Commission has for the most part carried out its congressional mandate and in so doing has earned a measure of investor confidence. The need for restructuring the SEC stems less from past failures than from the necessity for assuring that it will be able to respond to the ever-increasing pace and complexity of the securities industry.

Effective regulation by the SEC is threatened in that:

- The SEC has been unable to obtain adequate support and additional legislative authority largely because of its independence from Congress and the President.
- The collegial form of organization impedes the ability of the agency adequately to respond to the growing needs of the securities industry and the investor, conflicts with comprehensive agency policy-making and planning, and contributes to delays.

Furthermore, SEC administration of the Public Utility Holding Company Act, because it focuses in large part on technical power matters not significantly related to securities regulation, interferes with the primary responsibilities of the SEC.

Effective Administration

Independence from Congress and the President was originally intended to insulate the Commission from undue political influence. In fact, it has hampered the ability of the SEC to protect the public's interests as has its collegial form of administration (see ch. 1) Although the Commission has performed acceptably to date with the resources at its disposal, accelerating securities distributions and voluminous trading impede its ability to respond. For example, the workload of the Division of Corporate Finance of the SEC increased dramatically during the past 7 years. Filings of registration statements alone more than tripled, while the number of personnel assigned to that division was reduced (see app. 5–B). As a result, the time for processing registration statements has nearly doubled, with backlogs reaching unprecedented levels (see apps. 5–C and 5–D). Yet, the budget of the SEC has remained relatively constant since 1965, and personnel levels for the agency as a whole have declined (see app. 5–D, table 1).

Various studies have recommended increasing the funding and man-

power of the SEC,[14] but neither the President nor Congress has given full support to these proposals. Even though the executive branch exercises some control over the agency through the budget submission process, a President is not inclined to support an agency vigorously when he has little or no responsibility for its direction. For the same reason, Congress has not consistently allocated enough time and resources to help the SEC solve its complex problems.

Apart from manpower, funding, and legislative problems, radical changes in the securities industry raise questions about the ability of a collegial commission to provide adequate protection for the investing public. Commission statistics portray a brokerage industry that, at the peak of market activity in December 1968, failed to deliver securities worth $4.1 billion by the required settlement date.[15] In 1962 it was estimated that trading volume on the New York Stock Exchange would double by 1975. By 1968 that volume had already quadrupled.[16] In 1970, a record 2.937 billion shares were traded on the New York Stock Exchange, a daily average of 11.7 million shares.[17] Exchanges found it necessary to operate fewer hours each day and to close down operations entirely on some days to keep abreast of the trading pace. Computers are presently used or are being developed to expedite trading on all stock markets, but despite the decided advantages of these systems transitional difficulties have been noted.[18]

The geometric increase in volume is just one aspect of large-scale changes in the Nation's financial structure which demands attention. Financial instability is a principal factor in explaining why, since the beginning of 1969, 110 brokerage houses have either failed or merged; during the fall of 1970, the fifth largest firm, facing economic hardship, merged with the largest brokerage house.[19] In response to these and related pressures, the 91st Congress in December 1970 passed the Securities Investor Protection Act to guard against investor losses of cash and securities held by broker dealers.[20]

In addition, institutional investors—banks, mutual funds, trust funds, pension funds, and insurance companies—now dominate market trading, representing 62 percent of the public dollar volume on the New York Stock Exchange (see app. 5–E). Registered investment companies have grown from $2.5 billion in assets and 400,000 shareholders in 1940 to $70 billion in assets and 8 million shareholders in 1969.[21] Yet, despite this phenomenal growth, some of the SEC's activities, inspections of investment companies for example, have been declining (see app. 5–F).

The SEC as a collegial body at times finds itself debating what is to be done while problems in the investment community continue to mount.

Protracted proceedings and deliberations prevent it from keeping pace with change in the investment community.

Accordingly, we propose a new Securities and Exchange Agency headed by a single administrator, to be appointed by the President, confirmed by the Senate, and subject to removal by the President. Replacing the Commission with a single administrator would focus responsibility for agency performance on one person and improve agency administration by eliminating delays attributable to collegial decisionmaking.

The administrator would be responsible for all executive functions of the agency, including internal management, policymaking within congressional and presidential mandates, summary actions not requiring notice and hearing, promulgation of rules and regulations, granting exemptions, analyzing securities problems, making recommendations on legislation to Congress, and initiating cases to enforce the securities statutes and the agency's rules and regulations.

The position of administrator would tend to attract highly qualified individuals having the training and experience to deal with the complexities now facing the agency. Because more visible than a collegial body, a single administrator could be expected to be more responsible in his decisionmaking. He would be more accountable to Congress and the executive branch and therefore more likely to gain added support for legislative and budget requests of the agency. Moreover, as a result of the administrator's increased direction and authority, the agency would be able to attract and retain operating personnel of the highest caliber.

Adjudication

The SEC presently exercises judicial functions when it conducts full Commission reviews of agency proceedings. These review functions, because they encourage the Commission to act as a judicial rather than as an administrative body, conflict with the SEC's responsibilities to prosecute and formulate policy. For the reasons stated more fully in chapter 2, we believe that it is important to change this posture which encourages administrative delays through dilatory appeals and postpones the enunciation of policy guidelines until formal Commission decisions in individual cases are rendered. The single administrator would have 30 days for a limited review to assure that examiners' decisions are consistent with agency policy. Thereafter, appeals would be heard by the proposed Administrative Court of the United States.

TRANSFER OF PUBLIC UTILITY HOLDING COMPANY ACT

The expertise of the Securities and Exchange Agency ought not be diverted by attention to problems specifically relating to the operation of

the electric utility or the gas distribution industries. The SEC was originally given responsibility for carrying out the provisions of the Public Utility Holding Company Act to protect the investor in subordinate public utilities from excesses of holding companies. This goal has largely been achieved.[22]

Such regulation of public utility holding companies as is now required is markedly different from the other regulatory activities of the SEC, and detailed knowledge of the power industry is more readily available within the Federal Power Commission. Presently the SEC relies on the staff expertise of the FPC to provide data and analysis necessary to the disposition of its responsibilities under the Public Utility Holding Company Act. Legislation to effect transfer was introduced in the 91st Congress.[23]

For these reasons, regulation of public utility holding companies should be transferred to the new Federal Power Agency. The Securities and Exchange Agency, under its other statutes, would still retain the balance of securities regulatory responsibility over these companies.

CONCLUSION

Continued reliance on a collegial organization for securities regulation will not permit adequate protection of the investor nor sound direction for the industry. The SEC in its present form, which has served well in regulating a less complex and less dynamic industry, is increasingly unable to adapt to radical changes in the pace and nature of the securities industry. Establishing a Securities and Exchange Agency headed by a single administrator and limiting internal review of agency proceedings should result in an organization with sufficient responsibility and flexibility to deal with the growing problems which face securities regulation.

NOTES

1. M. Freeman, "A Private Practitioner's View of the Development of the Securities and Exchange Commission," 28 Geo. Wash. L. Rev. 18 (1959).
2. 15 U.S.C. 77a–77aa (1964), as amended (supp. IV, 1965–68).
3. See SEC Securities Exchange Act of 1934 release No. 9007 (Oct. 22, 1970).
4. 35 SEC Ann. Rep. 8 (1969).
5. P. Greer, "Wall Street Restructuring Due," The Washington Post, Dec. 23, 1970, sec. D, at 5, col. 5.
6. 15 U.S.C. 79–79z–6 (1964).
7. E. Gadsby, "Historical Development of the S.E.C.—The Government View," 28 Geo. Wash. L. Rev. 6, 9 (1959).
8. 15 U.S.C. 78a–78jj (1964), as amended (supp. IV, 1964–68).
9. 15 U.S.C. 17aaa–77bbbb (1964), as amended (supp. IV, 1965–68).
10. 15 U.S.C. 80a–1–80a–52 (1964), as amended (supp. IV, 1965–68).

11. 15 U.S.C. 80b–1–80b–21 (1964), as amended (supp. IV, 1965–68).

12. 35 SEC. Ann. Rep. 2 (1969).

13. Id. at 196.

14. See Landis report, supra p. I, note 4; Bureau of the Budget, Survey of Organization and Operations, Securities and Exchange Commission (1960).

15. 35 SEC Ann. Rep. 2 (1969).

16. Id. at 1.

17. A. Kraus, "Stocks End 1970 In Rousing Rally; Volume Sets Record," The New York Times, Jan. 3, 1971, sec. 3, at 1, col. 1; see generally N.Y.S.E., Research Dept., "Public Transaction Study 1969" at 3 (1970).

18. See 35 SEC Ann. Rep. 4–6 (1969).

19. Business Week, Jan. 2, 1971, at 15, col. 3; P. Greer, "New World Faces Brokers," The Washington Post, Dec. 22, 1970, sec. E, at 6, col. 4.

20. Securities Investor Protection Corp. Act, Public Law No. 91–598 (Dec. 30, 1970).

21. See address by Richard B. Smith, Commissioner, SEC, before New York Regional Group of the American Society of Corporate Secretaries, "A Little Perspective, Backwards and Forwards," in New York City, Feb. 19, 1970.

22. Id.

23. H.R. 15516, 91st Cong., Second sess. (1970).

CHAPTER 6

Power

PROPOSAL

That the Federal Power Commission be transformed into a Federal Power Agency headed by a single administrator. The agency would administer the statutes and carry out the functions now performed by the FPC, and would be given responsibility for administering the Public Utility Holding Company Act.

The production and use of power is becoming central to this Nation's economic and social well-being. In the past two decades, our economy has produced and continues to produce a wealth of labor-saving household and industrial devices unparalleled in any other society. Yet this achievement is tarnished by one of today's great ironies—an increasing doubt concerning the ability to deliver full and uninterrupted supplies of gas and electricity needed for the processes and products which the Nation demands.

The problems involved with electric power supply and its efficient delivery through interconnected electrical systems are aggravated by spiraling public demand [1] (see also app. 6–A). As a result, regions of the country have experienced a succession of brownouts and blackouts.[2] Problems of the deliverability of natural gas to meet peak demands and the possible long-range depletion of natural gas reserves challenge effective regulation today (see app. 6–B). The regulatory response necessary to address these problems must be rapid, flexible, comprehensive, and anticipatory. Serious questions arise as to the ability of Federal regulation,

as administered by the Federal Power Commission in its present form, to provide this kind of response.

The industries regulated by the Commission are among the most capital-intensive in our economy and are presently experiencing significant structural changes.[3] In light of the lengthy leadtimes these industries require to implement investment decisions, determination of long-range policy becomes essential. Yet, Commission structure and procedures, by allowing delays, impede the development of such policy and have a critical effect on the supply of power. In our view, a fundamental change in the structure of the FPC is required. We recognize that additional substantive legislation may also be needed, but we believe that a new Federal Power Agency headed by a single administrator is a necessary first step in assuring effective administration of regulatory responsibilities.

STATUTORY RESPONSIBILITIES

The Federal Power Commission was established by Congress in 1920 with regulatory authority over water power projects on certain waterways and adjacent public lands.[4] It was originally comprised of three commissioners—the Secretaries of War, Agriculture, and Interior. Internal disputes impaired its effectiveness and caused Congress, in 1930, to transform the Commission into an independent regulatory agency comprised of five commissioners, appointed by the President, to serve staggered 5-year terms, upon advice and consent of the Senate.[5]

Over the years, many new responsibilities have been added to the Commission's narrow initial mandate. The Water Power Act of 1920, as amended, now part I of the Federal Power Act of 1935,[6] authorized the FPC to license construction of and additions to hydroelectric facilities within its jurisdiction which are best adapted to a comprehensive plan for developing and improving waterways. In carrying out this duty, the Commission is charged with considering such factors as safety, conservation, navigation, and recreation. Part I also empowers the FPC to conduct investigations and collect data on hydroelectric matters, recommend Federal development of hydroelectric facilities, and cooperate with State and Federal agencies. Hydroelectric projects now provide 17 percent of the Nation's electricity. While this percentage will likely decline over the years, the Commission's regulatory role is complicated by the increasing use of pump-storage facilities as sources of peaking and reserve capacity, as well as by environmental concerns associated with hydroprojects.[7]

Parts II and III of the Federal Power Act [8] set forth FPC authority over public utilities engaged in the transmission and wholesale sale of electrical energy in interstate commerce. The Commission has jurisdiction

over utility rates, records and accounting practices, securities issuances, disposal, merger and consolidation of facilities, and the interconnection and coordination of facilities. It is directed to promote and participate in regional committees designed to coordinate planning for power needs and may conduct investigations of the industry for the purpose of preparing reports, studies, and statistical data.

In addition, the Commission is the principal Federal agency directed to consider the adequacy of the national supply of electricity. It is estimated that over the next 20 years, a 4.3 trillion kilowatt-hour increase in generating capacity (equivalent to 670 Hoover Dams or 1125 large nuclear powerplants) will be needed.[9]

The Natural Gas Act [10] established FPC jurisdiction over companies engaged in the transportation and wholesale sale of natural gas in interstate commerce. Such companies must obtain certificates of public convenience and necessity from the Commission to construct and operate facilities, and obtain approval prior to abandoning them. The FPC may order extensions of facilities or services under certain conditions, regulate wholesale rates, prescribe records and accounting practices, conduct investigations, require reports, and publish statistics.

EFFECTIVE POWER REGULATION

Effective regulation requires that power demands be met at the lowest cost compatible with the industry's continued ability to plan for and meet future needs. We found that the structure of the Commission fosters inefficiency. Specifically, the FPC:

- Formulates policy through a case-by-case approach that results in formidable docket backlogs;
- Decides critical issues only after unnecessarily protracted procedures and extensive delays;
- Experiences difficulty in coordinating broad policy directions with executive departments and agencies;
- Lacks accountability to, and adequate support from the executive branch and Congress.

Expeditious Procedures

The FPC has experienced considerable difficulty in developing procedures for efficient disposition of controversies, especially where a formal decision is required. Its propensity to resolve matters by litigation is illustrated by events following the Supreme Court's 1954 decision in *Phillips Petroleum Co.* v. *Wisconsin* [11] which held that the FPC should regulate the rates charged by independent producers for sale of natural gas to interstate pipeline companies. Six years later, when the agency's case-by-case approach had caused a backlog of 2,313 producer rate cases, the

FPC estimated that it would take 13 years to work through the pending docket alone.[12] Only when faced with this predicament did the Commission exercise its rulemaking power to obviate formal hearings for each individual producer.[13]

Case backlogs still plague the FPC. Approximately 125 cases awaited formal hearings in 1970—twice the number pending 5 years ago. At the average rate of 37 completed cases per year over the past 6 years, it would take the Commission more than 3 years just to dispose of that backlog (see app. 6–C).

The tendency of collegial bodies to prefer a case-by-case approach in the formulation of policy, as opposed to rulemaking or other less formal procedures, contributes significantly to delay. Policymaking by adjudication means that agency policy may change with the fact situation of each decided case. By this course, the FPC, in effect encourages unnecessary litigation, with its accompanying delays and expense. The case-by-case approach also tends to result in inconsistent and unpredictable regulation, thereby impeding long-range planning and attendant commitments by the affected portion of the industry. Wasteful backlogs—costly to the Commission, private litigants, and ultimately the consumer—can be reduced by informal policymaking. A single administrator would find it easier than a commission to formulate policy through rulemaking rather than adjudication, through negotiation rather than litigation. He would be able to make fair determinations more expeditiously since he would not have to seek consensus among his coequals nor deal with opposition from staff abetted by commissioner alliances.

As a corollary to the relative ease with which single administrators can make policy and anticipate issues that may arise, delays could be avoided by application of that policy to the facts at the hearing level. Furthermore, cases could more commonly be resolved at the hearing level rather than upon appeal. The inclination of collegial bodies to develop policy only as they decide individual cases dilutes the sufficiency of guidance to hearing officers and, for that reason, promotes appeals. The number of appeals could be lessened if agency policy were articulated prior to initial adjudicative proceedings.

The FPC in its present collegial form is preoccupied with exceptions taken to decisions of hearing examiners. Our proposal would permit the administrator, on his own motion, 30 days to modify an examiner's decision which is inconsistent with agency policy or to remand the decision to the examiner with appropriate instructions. By this procedure, the administrator could exercise control over the interpretation and application of agency policy through selective review of cases, in addition to his rulemaking prerogatives. As a result, hearing examiner decisions would more often conform to current agency policy and the time and

expense necessary to arrive at a final determination would be substantially reduced. Any aggrieved party could appeal decisions of hearing examiners—of if modified, of the administrator—to the proposed Administrative Court (see ch. 2).

The constant pressure of appeals from decisions of hearing examiners diverts Commission attention from setting and adhering to agency priorities. Long-range planning and such statutory obligations as conducting rate investigations are not pursued vigorously. A single administrator with a discretionary and limited review, relieved of the need to obtain consensus for policy decisions, would be able to focus on priorities for the agency as a whole and for the staff. Also, he would be better able to devote his time to more effective planning, management, and delegation of responsibilities.

Coordinated Response

Some decisions and responsibilities of the FPC require a recognition of the interrelated activities and interests of other governmental agencies. For example, the FPC's jurisdiction over interstate aspects of electrical energy generally does not extend to fuel sources (except for gas) necessary for generating electricity. Availability and the price of oil, coal, and nuclear fuels—now comprising 73 percent of fuel needs for the generation of electricity—are affected by decisions of other Federal agencies, thus making interagency coordination essential. In the future, this need will become more acute, since it is estimated that, by 1980, 83 percent of the requirements may be served by these fuels (see app. 6–D).

As Commissioner John A. Carver, Jr. has noted: "Today the critical aspects of utility operations are at least as likely to be the subject of proceedings before the SEC, AEC, Interior, Justice, HEW, or some component thereof, as before the FPC." [14] Yet interagency coordination, difficult under the best of circumstances, becomes almost impossible when handled through representatives of a commission which must reach agreement before action can be taken. A single administrator, relieved of the obligation to negotiate compromises, would find it easier to commit the agency to a decided course and delegate authority to subordinates participating in coordination efforts.

More Adequate Support

As with most of the regulatory commissions, the FPC has carried out its functions with diminishing resources relative to its workload. Thus, while the cases set for hearing have increased by 71 percent since 1965, personnel and budget support has lagged (see app. 6–E). With accountability to Congress and President obscured by its plural leadership, the Commission has also been handicapped in obtaining implementation

of its legislative submissions. For example, in response to FPC proposed legislation on electric power reliability aimed at more rapid development of adequate interconnections among electric systems,[15] Congress held hearings but took no further action despite recurring brownouts and blackouts.

Congressional and executive support would likely improve if both could look to a single, identifiable individual completely accountable for agency performance. Increased support, together with revisions of the structure of the agency and review of its decisionmaking process, would furnish the resources and framework necessary for effective regulation.

PUBLIC UTILITY HOLDING COMPANIES

In addition to modifying the organization form of the FPC, we propose transferring responsibilities for regulation under the Public Utility Holding Company Act [16] from the SEC to the Federal Power Agency. Difficulties encountered by the SEC in administering this act, and its dependence on FPC expertise, are discussed in chapter 5. The realignment would complement the power agency's existing responsibilities in this area.

CONCLUSION

If Federal regulation is to respond to dynamic technological advances and structural changes in the power industry, as well as to rapidly accelerating demands for power, that regulation must be accountable, timely, balanced in the interest of all parties, and coordinated with related matters. Collegial bodies have not met and cannot be expected to meet these criteria. With responsibility and authority vested in and delegated by one man, with limited internal review of agency decisions, and with judicial review vested in a specialized Administrative Court, power regulation could be more effective. The Federal Power Agency could establish appropriate priorities and devote itself to the neglected but important role of formulating policy to deal with current problems and to anticipate future needs.

NOTES

1. L. Mayer, Why the United States is in an "Energy Crisis," Fortune, November 1970, at 75.

2. See FPC, Prevention of Power Failures, vol. I at 21–30 (July 1967); FPC release Nos. 15608 (July 2, 1968), 15670 (Aug. 15, 1968), 15791 (Oct. 25, 1968), 15913 (Jan. 21, 1969), 16453 (Dec. 8, 1969), 16578 (Feb. 12, 1970), 17069 (Oct. 19, 1970).

3. See Mayer, supra note 1, at 159.

4. Federal Water Power Act, 41 Stat. 1063 (1920), as amended, 16 U.S.C. 791–823 (1964).

5. Act of June 23, 1930, 46 stat. 797. See P. Garfield and W. Lovejoy, "Public Utility Economics" 269 (Prentice-Hall, Inc., Englewood Cliffs, N.J., 1964).

6. 16 U.S.C. 791a–823 (1964), as amended (supp. IV, 1965–68).

7. 49 FPC Ann. Rep. 25 (1969).

8. 16 U.S.C. 824–25 (1964), as amended (supp. IV, 1965–68).

9. Address by John A. Carver, Jr., Commissioner, FPC, Annual Conference of the Atomic Industrial Forum, Inc., in San Francisco, Dec. 1, 1969.

10. 15 U.S.C. 717 (1964).

11. 347 U.S. 672 (1954).

12. Landis report, supra pt. 1, note 4, at 6.

13. See 18 C.F.R. 2.56 (1969).

14. Address before the Annual Conference of the Southeastern Electric Exchange, in Boca Raton, Fla., Mar. 25, 1970.

15. 47 FPC Ann. Rep. 5 (1967); 48 FPC Ann. Rep. 4 (1968).

16. 15 U.S.C. 79 (1964).

CHAPTER 7

Communications

PROPOSAL

That the Federal Communications Commission continue to be headed by a multimember body, reduced in size from seven to five members, serving staggered 5-year terms.

The Federal Communications Commission, established in 1934, is responsible for regulating interstate and foreign commerce in communications to assure "* * * a rapid, efficient, nationwide and worldwide wire and radio communications service with adequate facilities at reasonable charges." [1]

FCC REGULATORY DUTIES

Its specific responsibilities include regulating broadcast services, overseeing the development and rate structure of domestic and international telephone and telegraph services, and monitoring the use of special radio services. In addition, the FCC regulates the use of wire and radio communications facilities for national defense.[2]

In carrying out its responsibilities, with regard to broadcast services, the FCC acts on applications for construction permits and licenses for radio and television stations, assigns frequencies, sets operating power, designates call signs, and inspects and regulates the use of transmitter equipment.

In common carrier operations—telephone, telegraph, cable, microwave, and satellite communications—the FCC issues regulations, super-

vises charges, practices and classification of services, sets rates of return, and licenses radiotelephone and radiotelegraph circuits. The Commission reviews accounting practices, changes in industry structure, and applications for construction of new facilities and changes in service. It also administers telecommunications provisions of treaties and international agreements.

In spite of funding and personnel constraints in recent years (see app. 7–A), the Commission's areas of responsibility have grown dramatically both in breadth and complexity. It has had to integrate into its operations concern for communications satellites, CATV, subscription television, computer utilities, and other technological innovations in communications unknown and undreamed of at the time of its creation. These technological advances raise new and far-reaching questions for the FCC.

In the 10-year period between 1958–68, the number of authorized radio and TV stations doubled to over 10,000; stations licensed in the safety and special radio services field increased more than 300 percent to 1,723,098; and FCC licensed transmitters increased by 460 percent.[3]

The expansion of its traditional areas and the addition of new ones seriously challenge the FCC's ability effectively to regulate the wide variety of communication services and the industries which must supply those services to meet the Nation's needs.

A Unique Regulatory Mission

The FCC has a varied mission to regulate three basic areas of communication—broadcast, common carrier, and safety and special radio services.

The Commission deals with the most sensitive of issues in the broadcast area since its regulation relates, in part, to program content.[4] This responsibility today affects every user of a television receiver or radio. At the end of 1969, 98.5 percent of all American households had at least one television set and 99.7 percent had at least one radio.[5] The FCC's regulatory responsibility, already weighty, becomes more so as new types of equipment with the potential for similar levels of use become available and as the public comes to rely increasingly on audiovisual rather than on printed matter for informed participation in society.[6]

Under these circumstances, public confidence in the impartiality of government regulation of the content and transmission of information over broadcast media is vital to the maintenance of a free society.

In regulating program content and license renewal, the FCC can have substantial effect upon the political process. The Commission's "fairness doctrine" requires that if a station presents one side of a controversial public issue, reasonable opportunity must be provided for the presentation of opposing views.[7] In recent times, the fairness doctrine has been

involved in several major public controversies, including those arising from the 1968 Chicago Democratic Convention [8] and the broadcast of cigarette commercials and antismoking spots.[9] In 1970, a major issue concerned the right of an opposition political party to free time for fair opportunity to reply to presidential broadcasts.[10]

These and related responsibilities in the area of program content are clearly distinguishable from the general responsibilities of other regulatory commissions in that they involve decisions which are highly subjective, based on individual value judgments and personal taste. While it cannot be said that regulation in any area approaches an exact science, decisions in the transportation, power, and securities areas involving strictly economic or legal issues can be made in a more analytical manner. In those regulatory areas there is a narrower range of judgmental factors. Economic regulation is more dependent on the application of accepted standards and precedents.

While government regulation should be immune from control by partisan politics in all areas, we believe that requirement must be emphatically observed in practice in the communications area. Regulation of the broadcast media must be structured so that it protects the free and open exchange of ideas. Control or distortion of information at its source might not even be perceived, the damage to society can be substantial, and there is no remedy through which such harm can be *undone*.

A STRUCTURE FOR IMPARTIALITY

While it is our view, as set forth in chapter 1, that a single administrator provides for greater administrative effectiveness than a collegial body, we have concluded on balance that more effective administration should give way to the need for broad-based deliberation and a nonpartisan environment in the communications field. Those regulatory functions of government which intrinsically affect the free flow of information and ideas must be carried out so as to increase the probability that the values and beliefs shaped by information are not warped to suit the aims of any group.

A single administrator for the FCC would be in an exceptionally vulnerable position which, because of its appearances, could impair public trust. The public is entitled to assume that the information it obtains through the broadcast media is not distorted by the political perspectives of the party in power. Although coordination of regulatory policy with executive branch responsibilities is important in all areas of regulation, placing in the hands of a single administrator, appointed to serve at the pleasure of the President, the power to exercise control over industry

members through licensing and programing decisions could create the suspicion of improper political influence over the content of broadcasting.

When, however, authority is dispersed in a bipartisan commission, no one political ideology or individual interpretation is likely to pervade the regulation of broadcast content. The collegial form increases the probability that internal checks and balances will be effective. Notwithstanding administrative inefficiencies, that form tends to insulate the exchange of ideas and information from partisan control and assure that decisions which are necessarily subjective in character reflect the personal values of more than a single individual. Accordingly, we recommend that collegial organization be retained for the FCC.

At the same time, we propose that the number of FCC commissioners be reduced from seven to five to minimize inefficiency caused by the sheer number of commissioners considering each issue. This would alleviate some of the problems of collegial management, while preserving the bipartisan safeguards which we believe are necessary in this field of business regulation.

Alternatives Considered

Since it is the uniqueness of FCC regulation over broadcast content which requires continuation of the collegial form, we considered placing this function in a new agency and leaving the balance of the functions to be presided over by a single administrator. In spite of the distinctions between broadcast regulation on the one hand, and the regulation of common carrier and safety and special radio services on the other, we concluded that these functions should continue in one agency on the theory that government should organize around broad and substantial purposes to avoid an unmanageable proliferation of agency structures. Communications regulation is such a purpose. Moreover, we recognized that the interrelatedness of those facets of regulation at this time, and increasingly in the future, requires that they be regulated by the same agency. Thus, for example, the three largest television networks paid to the telephone carriers over $45 million in 1967 merely for interconnections among broadcast stations.[11] Most important, broadcast services are now making expanded use of satellite communications as well as cable connections for closed-circuit programing.

CONCLUSION

Our proposal to retain the bipartisan commission form for the FCC is based on the critical importance of maintaining public confidence in the impartiality of government regulation of program content. A reduc-

tion in the number of FCC commissioners should result in improved regulatory effectiveness without raising the prospect of partisan control over the broadcast media or of individual interference with the free exchange of ideas and information.

NOTES

1. Communications Act of 1934, 47 U.S.C. 151 et seq. (1964).
2. Id.
3. E. Shriver, "CPR Agency Study/Federal Communications Commission," CPR National Journal 235, 244 (Nov. 29, 1969).
4. 47 U.S.C. 303.
5. U.S. Bureau of the Census, "1969 Statistical Abstract of the United States" 704 (90th ed., Washington, D.C. 1969).
6. See, e.g., Z. Brezezinski, "Between Two Ages, America's Role in the Technetronic Era" 20–21 (Viking Press, New York, 1970), citing "UNESCO Statistical Yearbook, 1967," tables 5.1, 8.2, 8.2; "Television Quarterly" 47 (spring 1968); and J. Robinson, "Public Information About World Affairs" (Ann Arbor, Mich. 1967).
7. Id. at 2.
8. Letter from FCC to ABC, CBS, and NBC, 16 FCC 2d 650 (Feb. 28, 1969).
9. "Applicability of the Fairness Doctrine to Cigarette Advertising," Memorandum Opinion and Order, 32 F.R. 13162 (Sept. 15, 1967).
10. "In re Five Compliants, Alleging Violation of the Fairness Doctrine by the Three Networks," 25 FCC 2d 283 (Aug. 14, 1970).
11. K. Borchart, "Structure and Performance of the U.S. Communications Industry: Government Regulation and Company Planning" 10 (Division of Research Graduate School of Business Administration, Harvard University, Boston, 1970).

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Scope
and
Methodology

Scope and Methodology of Study

The President's directive to the Council was to consider:

> "(1) the organization of the executive branch as a whole in light of today's changing requirements of government; (2) solutions to organizational problems which arise from among the 150 plus departments, offices, agencies, and other separate executive organizational units; and (3) the organizational relationships of the Federal Government to States and cities in carrying out the many domestic programs in which the Federal Government is involved." (White House press releases dated April 5, 1969, and June 2, 1969.)

At a press conference on April 29, 1969, Mr. Ash, Chairman of the Council, stated:

> "The purpose of our Council is to consider the totality of the executive organization, the independent agencies, the departments, the other committees and commissions that in turn are all a part of carrying on the executive functions of the Government and to particularly recommend those ways in which, through organizational change, the effectiveness of these Government agencies and departments might be improved."

Among its several areas for study, the Council decided upon the seven major independent regulatory commissions. Although this study bears some similarity to earlier analyses of the independent commissions—such as those of the Brownlow Committee in 1937 and the Second Hoover

Commission in 1955—its focus has been the broad organization of the commissions, their accountability, and their coordination with other governmental units.

Albeit our objective was to undertake a comprehensive review of the regulatory process, our mandate to develop broad organizational recommendations required us to narrow the focus of the study.

FOCUS

We noted initially that the independent commissions shared certain characteristics with other agencies, boards, and commissions of the executive branch:

- They are multiple-headed bodies to which Congress has delegated mixed policymaking and managerial responsibilities.
- Their activities directly concern economic and public policy goals and are interrelated with the responsibilities of the President and Congress.

These observations suggested that our overall focus should be to apply organizational principles which would enable the regulatory process to become an integral part of the development, expression, and carrying out of national economic and public objectives.

More specifically, our focus was centered on four dimensions of the regulatory process:

- The internal processes of each of the seven commissions, such as development and application of policy, distribution of functions, personnel considerations, and administrative bottlenecks in the disposition of agency workload, but excluding vertical organization within the agencies and the efficiency of internal agency procedures.
- The relationship of the seven commissions to the Congress and the President and the development and implementation of national economic and public policy goals.
- The relationship of the seven commissions to other operating organizations exercising similar or related regulatory or administrative responsibilities, such as the Department of Transportation, the Department of Commerce, and the Department of Justice.
- The effects of the seven commissions on the structure and health of the national economy and the industries serving it, including competition, technological innovation, changes in industry structure, and the interests of consumers.

Although our study uncovered substantive deficiencies in the regulatory process requiring revision of underlying statutes and alterations in the processes of regulation, we limited our recommendations to matters of structure.

APPROACH

For basic background information and preliminary identification of issues and problems, we relied substantially on existing published studies and analyses of the regulatory process, rather than conduct a separate collection and analysis of empirical information.

Our study consisted largely of indepth interviews with over 200 participants in and observers of the regulatory process. Those interviewed represented the viewpoints of past and present commissioners and staff, other government organizations, congressional committee staff, various regulated industries, nongovernment academic authorities, public administrators, and others. Individual interviews were augmented by group seminars on three special topics: (i) general organizational concepts for effective administration; (ii) transportation regulation; and (iii) antitrust enforcement. These interviews and seminars enabled us to ascertain the major problems and deficiencies of today's regulatory process, as seen through the eyes of those most familiar with it.

To put the issues into perspective, we studied the structure of the existing commissions, the statutory foundations for collegial organization, and substantive responsibilities in each of the regulatory areas. This enabled us to frame various alternatives to remedy the deficiencies found. We selected those which seemed best suited to improve regulatory effectiveness.

Appendices

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APPENDIX 1–A

SUMMARY OF THE MAJOR STUDIES AND LEGISLATION RELATING TO DISABILITIES OF COLLEGIAL ADMINISTRATION

1934 American Bar Association Proposal

This early study called for streamlining administrative machinery by abolishing independent regulatory boards and commissions:

> The committee has reached its conclusion in this regard chiefly from the point of view of efficiency, proper coordination of government activities under a limited number of executives responsible to the Chief Executive, and avoidance of the confusion that follows upon the maintenance of a vast number of separate agencies, responsible to no one, sometimes with overlapping jurisdiction, and each pouring fourth annually a large volume of rules, regulations, and other pronouncements having the force and effect of law.

It also recommended that administrative positions involving the exercise of judicial functions not be held at the pleasure of the President, but instead for terms fixed by Congress.

(*Report of the Special Committee on Administrative Law before the 57th Annual Meeting of the American Bar Association, Milwaukee, Wis., Aug. 28–31, 1934.*)

1937 President's Committee on Administrative Management

The report of this committee criticized delay and waste that collegial management encouraged, while viewing the President as a kind of manager influencing Congress on legislative matters and offering legislative

proposals. Commissions were seen as interfering with the President's role as manager, cooperating with him only when they wish to do so.

The committee suggested putting administrative tasks into various executive departments run by a single-headed bureau.

> In the first place, rulemaking by an administrative section does not mean rulemaking by a single officer, but by an entire hierarchy of officers whose successive checks are as effective as the collective efforts of any board. The rulemaking now done by executive departments is quite as satisfactory as that done by independent commissions, with the added element of the effective responsibility to its credit. * * * On the other hand, so far as administration carried on by a group is concerned, there is little to commend it. It is on the purely administrative side that the independent commissions are weakest, and gain rather than loss would result from centralizing control and responsibility, even in the administration of vitally important regulatory powers.

The study concluded that the structure of commissions was flawed. Good government, it was reasoned, could not flourish in a planless organization.

> (*The President's Committee on Administrative Management, Report of the Committee with Studies of Administrative Management in the Federal Government* (*U.S. Government Printing Office, Washington, D.C., 1937*).)

1941 Attorney General's Committee

The committee found that commissions had failed to properly delegate their powers and that the collegial form diffuses rather than focuses agency accountability. The study suggested that every commission delegate its internal affairs to responsible members; that every agency tribunal delegate to one or more of its members the power to decide cases after hearing or an appeal; and that where ultimate authority in any agency is vested in a single individual, he delegate authority for final adjudication to such agency tribunals as he may prescribe.

A minority report proposed a code of standards of fair administrative procedure. It advised that the full commission be allowed to vest in any one or more of its members any of the commission's powers or functions.

> (*Final Report of the Attorney General's Committee on Administrative Procedure* (*U.S. Government Printing Office, Washington, D.C., 1941*).

First Hoover Commission, 1949

This commission recommended that the commission chairman be designated by statute as administrative head of each commission primarily responsible for its administrative duties and for supervision of staff.

To facilitate communication between the President and the Commission, the task force urged that:

* * * each commission be headed by the member most acceptable to the President. This will enable the President to obtain a sympathetic hearing for broader considerations of national policy which he feels the commission should take into account.

This arrangement has advantages for the commission as well. Over the long pull, it must function as a part of the Government as a whole. For one thing, it can accomplish its duties only with proper appropriations and that may require sympathetic help from the Chief Executive with respect to its budget.

The task force especially emphasized the need for a strong chairman:

Able and intelligent men will recognize that a committee is not well fitted for administration and that centering that responsibility in the chairman does not derogate from the standing or authority of the other members. Indeed, competent men are more likely to be willing to serve where a commission is well run under an able chairman than where it is badly managed and no one has the necessary authority to correct the situation.

The full Commission report agreed with the task force in that all administrative responsibility be vested in the chairman. The task force saw value in commissions, but felt that they could be accomplishing more:

The very qualities which make these agencies valuable for regulation, especially group deliberation and discussion, make them unsuited for executive and operating activities.

(*The U.S. Commission on Organization of the Executive Branch of the Government, Committee on Independent Regulatory Commissions: A Report with Recommendations, Task Force Report (app. N), Jan. 13, 1949 (U.S. Government Printing Office, Washington, D.C. 1949).*)

(*The U.S. Commission on Organization of the Executive Branch of the Government, the Independent Regulatory Commissions, Rept. No. 12, March 1949 (U.S. Government Printing Office, Washington, D.C. 1955).*)

Reorganization Plans of 1950

Reorganization Plans Nos. 8, 9, 10, 13, affecting the FTC, FPC, SEC, and CAB, respectively, sought to strengthen powers of the chairman he did not previously have; namely (1) appointment and supervision of personnel; (2) distribution of business among such personnel and among administrative units; and (3) use and expenditure of funds. The full commission, however, was still left with authority to distribute appropriated funds according to major programs and purposes.

(*Reorganization Plans Nos. 8, 9, 10, 13 effective May 24, 1950, 15 F.R. 3175, 64 Stat. 1264–1266.*)

Reorganization Plans of 1961

These plans, affecting the CAB and the FTC, allowed commissions to delegate any functions to a division of the commission, an individual commissioner, a hearing examiner, or an employee. They also transferred additional functions to the chairman; namely, assignment of personnel, including commissioners.

(*Reorganization Plans Nos. 3 and 4, Plan 3 effective July 3, 1961, 26 F.R. 5989, 75 Stat. 837; Plan 4 effective July 9, 1961, 26 F.R. 6191, 75 Stat. 837.*)

APPENDIX 1–B

Excerpts from:

"The Regulatory Process: A Personal View" by Philip Elman, Federal Trade Commissioner

(American Bar Association, Antitrust Section, St. Louis, Mo., August 11, 1970.)

Today, when all institutions of government are found wanting, none has been more criticized—and less responsive to such criticism—than the independent regulatory commission. * * *

While the criticisms cover a very broad ground, the most fundamental deficiency has been found to be the agencies' chronic failure to fulfill their unique quasi-legislative function of developing and implementing regulatory policies responsive to public needs and the public interest. With each new study and report, there is the same ritual call for better appointments and improved administration. Yet the agencies go on essentially unchanged and seemingly undisturbed, with little evidence of basic improvement in performance.

Without a doubt, the theory underlying the independent regulatory commission was original and brilliant. It emphasized the agency's independence; its ability to bring expert judgment to bear upon technical and complex economic issues; its insulation from political partisan control; its capacity to provide both continuity and flexibility of policy; and its blending in a single tribunal of a wide range of powers and functions, from general rulemaking to case-by-case adjudication, permitting the agency to exercise broad discretion in choosing the best tool for dealing with a particular problem. * * *

We must now look to experience more than theory. * * *

Experience shows, I believe, that the independent multimember regulatory commission suffers from the defects of its virtues. Independ-

ence, collective deliberation and decisionmaking, and fusion of powers and functions in a single agency, are all useful values in the administrative process; but we have pushed them too far, relying too much on the pure simplicities of the original theory and neglecting the lessons of actual experience. It is time for radical structural reform. * * *

The public suffers from too much of the wrong kind of regulation. Broadly speaking, government regulation is necessary and justified only when it serves the public interest, not the special interests of private groups or industries. While the lines of demarcation are not always sharp and clear, we should recognize that preservation of the environment, and protection of the health and safety and other essential interests of the public, are proper objectives of government regulation; shielding businessmen from the risks of competition and the marketplace is not. So-called infant industries may perhaps need a helping hand from government for a short time; but we should not go on sheltering and subsidizing them forever in the guise of protective regulation. The present transportation mess is an obvious example of what results from misguided regulation. Regulatory institutions should not be allowed to develop permanent lives of their own, impervious to changing conditions and needs. Existing and proposed regulatory programs should constantly be reexamined, and, to the maximum extent possible, competition should be established and maintained as our national economic policy—in fact as well as in rhetoric. * * *

According to the theory, the independence of the regulatory commission would be a source of institutional strength, insulating its members from partisan political pressures and enabling them to act creatively and boldly. Its multimember structure would insure that agency decisions would be reached after group deliberation, providing both a barrier to hasty or arbitrary action and assurance of judicious and prudent policies. And its flexibility and fusion of powers would assure that case-by-case adjudication would be used, not in the traditional manner of the courts for the purpose of applying established legal rules to particular cases, but rather for the primary administrative purpose of developing new, wise, and informed regulatory policies responsive to changing conditions and public needs.

In each of these basic respects, however, there is a wide gap between the theory and the fact of the regulatory process.

In fact, independence and security of tenure for agency members have not achieved the intended result of insulating agencies from undesirable political pressures and special interest pleading. Of course, government regulators are—and should be—subjected to external pressures and influences. But we must distinguish between those that are improper or harmful to the public, and those that are not only legitimate but necessary and

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desirable. It is one thing for agency members to be responsive to narrow, partisan, political or special interests; it is quite another to be attentive to, and indeed welcome, the advocacy of consumer interests and public needs. Paradoxically, independence and security of tenure tend to encourage the former and to discourage the latter. In fact, they foster, on the one hand, agency passivity and a reluctance to "rock the boat" by antagonizing powerful special interest groups; and, on the other, an attitude of complacency and indifference to those larger public concerns for which there is as yet no effective "people's lobby."

Since agency members are appointed for long terms and cannot, for all practical purposes, be removed from office, the public cannot take effective action against the regulators directly. * * *

So long as the agencies constitute a "fourth branch" of government for whose performance no one holds him accountable, a President is under little pressure either to seek out the best qualified men or to resist political influence. It would be instructive to compare the agency members appointed over, say, the last quarter of a century with the assistant secretaries (or assistant attorneys general) chosen during the same period. Both positions receive the same pay and, theoretically, enjoy the same status and prestige. In fact, however, the caliber of appointments to the two categories is vastly different, as are the criteria for selection.

A President knows that after an independent agency member is appointed, he is essentially on his own; and if he proves to be incompetent or unresponsive to the public interest, the President will usually not be held at fault. On the other hand, an incompetent assistant secretary reflects directly on the President, his administration and his standing with the public. Every President incurs political obligations. The independence of the regulatory agencies tempts a president to satisfy a political debt to a deserving friend or supporter by appointing him to a comfortable agency berth. * * *

Another consequence of carrying the concept of independence too far is that it impedes the development of comprehensive and harmonious national policies in such broad areas, for example, as transportation, communications, and trade regulation, where a single agency's responsibility covers only part of the field. In these areas we should not let the abstract notion of agency independence interfere with the President's constitutional power and duty to take care that the laws enacted by Congress are faithfully executed; that the various agencies concerned do not neglect their statutory responsibilities; and that the specific regulatory policies followed by each of them are complementary and coordinated with basic national goals.

Turning now to its multimember structure, experience shows that this produces a dangerous depersonalization and invisibility of agency activ-

ity. When the public is only dimly aware of an agency as a distant and impersonal institutional entity, when one man cannot clearly be identified as responsible, who is there to hold accountable for the agency's shortcomings? Group deliberation and decisionmaking also engender unnecessary delay as well as indecisiveness, compromise, and the expedient of solving difficult and controversial problems by waiting for them to go away. As everyone with agency experience knows, its multimember structure is a substantial and frustrating obstacle whenever swift and incisive regulatory action is required. * * *

Case-by-case adjudication of alleged violations of law has proved to be inefficient and ineffective, and, in many cases, unfair. Litigation is an excessively slow, expensive, clumsy, and inadequate process for resolving technical and complex economic issues. * * *

The strongest argument I would make against agency adjudication of alleged violations of law is that the blending of prosecutorial and adjudicative powers in a single tribunal imposes intolerable strains on fairness. The problem of avoiding prejudgment, in appearance or in fact, constantly hovers over all agency activity, and is troublesome to agency members in almost every kind of action it takes. It can arise in the most subtle as well as obvious forms.

Consider for example, the so-called test case where the agency issues a complaint in order to establish a new legal principle or remedy. * * * Agency members frequently take an active part in the precomplaint investigative and prosecutorial phases of these cases; and the complaint is usually issued with the knowledge that, because of the novelty and importance of the issues, it will be fully litigated and be back for adjudication on the record. When such a test case does come up on appeal to the agency members, while there is no bias or prejudgment of guilt in the classic sense, there is an inescapable predisposition in favor of the agency position as set forth in the complaint. * * *

An agency member may vote for an order not because he is personally convinced that there is a violation of law but because he feels, perhaps in an excess of humility, that since it is a test case involving a doubtful or unsettled question of law, his duty is to find against the respondent so that the case may go on to the courts for definitive resolution. * * *

But the judicial process is designed to insure that the judge is both neutral and disinterested, and has no interest other than that of applying the law fairly and evenhandedly. An agency member, on the other hand, cannot be unconcerned with whether the outcome of the case is to advance or to retard an important agency program to which substantial resources have been committed. Even the most conscientious regulator cannot, when he acts as judge, ignore the effect which the decision will have on the agency's regulatory policies and goals.

Moreover, an agency member cannot escape the implications of his leadership role in the agency. He may fear the effect on staff morale if he votes to dismiss the complaint or reject the agency position in an important case. He may prefer to see the onus of dismissal borne by a reviewing court. And an agency member, qua judge, may well be apprehensive that dismissal of a complaint will imply that he made an error in having voted, qua prosecutor, to issue it. * * *

Thus, while I have long held to the opposite view, I am now convinced that we will lose nothing, and gain much, by eliminating from agencies like the Federal Trade Commission the function of case-by-case adjudication of alleged violations of law. This function should be transferred either to the district courts or, preferably, to a new trade court which is decentralized and holds hearings in every State, thus bringing the judicial phase of the regulatory process much closer to the people. The trade court could be given jurisdiction not only of complaints prosecuted by the agency, but also private class-action suits brought by consumers and competitors injured by the same alleged unfair trade practices. To permit full and comprehensive disposition of the case by a single tribunal, the court should have authority not only to issue preliminary and final injunctions, but also, where appropriate, to award damages, civil penalties, and other equitable relief.

Relieved of its adjudicative responsibilities, the agency's remaining functions should be vested in a single commissioner serving at the pleasure of both the President and Congress, and removable by either (in the case of Congress, by a majority vote of both Houses). This would permit the public to hold both the President and Congress accountable for an agency's continued failures or poor performance. * * *

Elimination of the adjudicative function will enable an agency to concentrate its resources on a single central objective: The development and enforcement of regulatory policies carrying out the statutory mandate. To that end, it would conduct investigations and studies, utilizing fully its power to gather information on emerging regulatory problems; it would make expanded use of its rulemaking authority (including issuance of guides and enforcement statements) as the primary method for formulating policies and standards; it would proceed in court against persons charged with engaging in unlawful acts or practices, including those prohibited by valid agency rules or regulations; and it would advise the Congress and the President on any need for new legislation. All of these essential administrative tasks, executive and quasi-legislative in nature, are better performed, more quickly and more incisively, by a single administrator than by a multimember tribunal.

Centralizing full authority and responsibility for an agency's activities in a single administrator will unquestionably facilitate the develop-

ment and formulation of regulatory policy. It will also lighten the burden of fashioning comprehensive and coordinated national policies in those areas where other government agencies or departments have overlapping responsibilities.

Moreover, an agency should be no less independent, in the best sense of the term, because it is under the leadership of a single man. The agency should still be required to develop regulatory policies that are truly nonpartisan and responsive to public and consumer needs, and not to those of special interest pleaders. By increasing its visibility and accountability to the public, the proposed change in structure should result in a far greater degree of agency responsiveness than now exists.

Admittedly, having only one man in charge may make it easier to exert political pressures on him, bad as well as good. * * * The present structure of the agencies has failed to insulate them from improper influences, while the proposed change at least offers the hope of increased responsiveness to consumer needs and the broad public interest. Nor do I see any reason why a policy making government regulator should be appointed for a long term of years, and not be removable from office despite continued public dissatisfaction with his performance. Such a public official should be required to live dangerously in that respect. * * * If Congress, the President, or the public is disappointed with an agency's performance, there should be one man upon whom attention can focus and from whom immediate improvement can be sought. We cannot do that with the independent regulatory commissions today; and both they and the public suffer from it.

With a single man given full authority and responsibility for an agency's activities, it should be easier to attract better men. A President will be more reluctant to appoint incompetent commissioners, for their failure will be his failure; their incompetence will be his embarrassment; continuing them in office, despite poor performance, will be his responsibility. * * *

I think it would be a serious mistake to transfer the regulatory agencies to the large executive departments where they would disappear, like the Food and Drug Administration, submerged under massive layers of bureaucracy. Agencies should continue to be independent in that sense—so that they may be clearly visible, fully accountable, and unable to blame others for their own deficiencies.

I am not as fearful as I once was that transferring agency adjudication to the courts would create a competing organ of policymaking. If the proposed changes should result, as I believe they will, in far greater and more effective utilization by the agencies of their administrative powers—again I stress the tremendous potential of rulemaking as a practical and fair method for developing and articulating regulatory policy—

there will be little danger of judicial usurpation of the agencies' authority. * * *

It is perhaps unnecessary to say, in conclusion, that no reforms in the structure of the regulatory agencies will succeed unless there also are radical changes in the climate of government and the political processes. * * * We must institutionalize the means whereby the public may be aware of, and participate in, political and governmental processes that affect the quality of all our lives. We must open wide the doors and windows of government agencies, so that the public may see for itself what is or is not being done, and demand an accounting from those in charge.

Every institution of government must be renewed and adapted to changing social and economic conditions. It is no criticism of the administrative process, and the creative scholars and statesmen who have nourished its growth, to find that it is no longer adequate to the needs of the present and the future. The current widespread dissatisfaction with the performance of the regulatory agencies offers an opportunity for genuine reform. * * * This opportunity should not once again be allowed to slip by, without meaningful change and improvement.

APPENDIX 2–A

SUMMARY OF MAJOR STUDIES RELATING TO THE CREATION OF AN ADMINISTRATIVE COURT

1934 American Bar Association Proposal

A special committee on administrative law reported to the 57th annual meeting of the ABA in 1934 and recommended creation of an administrative court. Specifically, it urged that:

- Judicial functions of Federal administrative tribunals be divorced from their legislative and executive functions and placed in a Federal administrative court with appropriate branches or in an appropriate number of independent tribunals subject to judicial review;
- Judicial power not be delegated by Congress to any nonjudicial tribunal;
- Abolition of independent boards and commissions and substantial reform of existing administrative machinery;
- Establishment of a court consisting of a large number of judges to permit its organization into divisions and branches for deciding particular classes of administrative controversies.

The committee felt that the evils present in the multiplicity of Federal administrative tribunals were mainly due to three factors:

- Combination of judicial with executive and legislative powers;
- Insecure tenure of office of administrative judicial officers;
- Lack of effective independent review or judicial control of administrative decisions.

The court would be patterned to some extent after the administrative court system in France. It would have an appellate division, power to

adjudicate issues of fact as well as law and would be constituted as a legislative, not constitutional court.

The committee's proposal for an administrative court expressly represented an ideal, rather than something of immediate practical application.

(*Report of the Special Committee on Administrative Law, before the 57th Annual Meeting of the American Bar Association, Milwaukee, Aug. 28–31, 1934.*)

1936 American Bar Association Special Committee on Administrative Law

The committee found fault with the seeming incongruity of policy-making, prosecuting, and adjudicating within the same agency, while noting that constitutional courts would not ordinarily review the findings of fact made by the agencies.

Accordingly, the committee recommended an administrative court of 40 judges, 35 to come from the existing Court of Claims, board of tax appeals, Custom Court, and Court of Customs and Patent Appeals. The court's trial division of four sections would have jurisdiction over claims, customs, and tax matters and would have original jurisdiction to revoke and suspend all licenses, permits, registrations, or other grants. The appellate division would have jurisdiction to review decisions of the trial sections and would absorb the jurisdiction of the Court of Customs and Patent Appeals. Decisions of the court could be appealable on certiorari to the Supreme Court.

(*American Bar Association Special Committee on Administrative Law, 61 ABA—Rept. 721–793 [1936].*)

1937 President's Committee on Administrative Management

The committee recommended organization of a judicial and administrative section in each regulatory commission to assure judicial neutrality. Transfer of the independent commissions into regular executive departments was also urged.

The committee felt that a separate administrative court dealing with questions of both law and fact would impair the regulatory responsibilities of the agencies.

(*The President's Committee on Administrative Management, Report of the Committee with Studies of Administrative Management in the Federal Government, U.S. Government Printing Office, Washington, D.C., 1937.*)

1941 Attorney General's Committee on Administrative Procedure

This committee report provided the basis for subsequent enactment of the Administrative Procedure Act of 1946.

It stated that there was a necessity for delegating functions and authority within the agency.

The committee recommended the use of hearing officers as a separate unit within each agency to initially decide cases. There would be appeal of the officers' decisions to the heads of the agency who might review the full records. It was felt that the separate office of hearing commissioners was the kind of internal separation of function which would assure impartiality in agency proceedings.

The dissenting position of these members favored complete separation of judicial functions and recommended an administrative court.

(*Final Report of the Attorney General's Committee on Administrative Procedure, U.S. Government Printing Office, Washington, D.C., 1941.*)

1955 Second Hoover Commission

The commission felt that in essentially judicial proceedings before the agencies—proceedings in which the remedy awarded is one ordinarily granted by the courts—there was little protection of private rights. It therefore urged that judicial functions be separated. The separation could be to persons not participating in agency adjudications or to the courts.

The commission recommended that:

> Congress should look into the feasibility of transferring to the courts certain judicial functions of administrative agencies, such as the imposition of money penalties, the remission or compromise of money penalties, the award of reparations or damages, and the issuance of injunctive orders, wherever it may be done without harm to the regulatory process.

Functions that could not be readily transferred to courts of general jurisdiction were to be removed from agency control and placed in an administrative court of the United States.

The administrative court, to be divided into tax, trade, and labor sections, was viewed as a vehicle for the evolution of agency adjudication and eventual transfer of all judicial activities from the agencies to courts of general jurisdiction.

(*The U.S. Commission on Organization of the Executive Branch of the Government, Legal Services and Procedure, U.S. Government Printing Office, Washington, D.C., 1955.*)

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APPENDIX 2–B

SUMMARY OF MAJOR BILLS TO CREATE AN ADMINISTRATIVE COURT

The following are among the most significant bills introduced in Congress since 1929 to create an administrative court. None have been adopted.

1929 Norris Bill—*(S. 5154, 70th Cong., Second Sess.)*

Proposed an administrative court to unify the Court of Claims, the Court of Customs Appeals, and the Board of Tax Appeals, and to have exclusive jurisdiction in claims and tax cases and appellate jurisdiction in customs cases.

1933 Logan Bill—*(S. 1835, 73d Cong., First Sess.)*

Proposed that the court would have exclusive appellate jurisdiction, rather than exclusive original jurisdiction in tax cases; in patent cases it would have appellate jurisdiction.

1936 Logan Bill—*(S. 3787, 74th Cong., Second Sess.)*

Proposed that all of the various specialized courts be merged into an administrative court. Also proposed transfer of the agencies' power to revoke or suspend licenses, permits, grants and registration to the administrative court, which would have exclusive jurisdiction in these matters. Representative Celler introduced the same bill in the House (H.R. 12297, 74th Cong., Second session, 1936) where it died in committee.

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1937 Logan Bill—*(S. 273, 75th Cong., First Sess.)*

Proposed a specialized administrative court to review agency actions regarding licenses, permits, registrations, and other grants.

1938 Logan Bill—*(S. 3676, 75th Cong., Second Sess.)*

Broadened the jurisdictional provisions of the 1937 bill to include all final orders and decisions of the Board of Tax Appeals, the regulatory commissions, and numerous other agencies. The court would have review jurisdiction. This bill was supported by the ABA, passed both houses of Congress, but was vetoed by President Roosevelt in 1940.

1953 McCarran Bill—*(S. 14, 83d Cong., First Sess.)*

Proposed a court with jurisdiction of all cases which would otherwise be within the jurisdiction of any court of the District of Columbia for judicial review of an agency action and for the civil enforcement of the rules, orders, or investigative demands of any agency. The court would also be able to issue declaratory orders with respect to agency action or powers and compel or direct taking of agency action wrongfully withheld or erroneously applied.

1955 McCarthy Bill—*(S. 2541, 84th Cong., First Sess.)*

Proposed a court which would possess all the powers of a Federal district court, and would have jurisdiction to render judgments, issue orders, and conduct proceedings under the tax, trade, and labor laws.

1959—*(S. 1273, 1274, 1275, 86th Cong., First Sess.)*

Proposed a special Labor Court, and Tax Court, and Trade Court respectively. The courts would be trial courts with original jurisdiction to issue final orders and judgments reviewable by U.S. Courts of Appeals.

1963 Bennett Bill—*(H.R. 43, 88th Cong., First Sess.)*

Proposed an administrative court with concurrent jurisdiction with the several agencies to hear and determine disciplinary, enforcement, suspension, and revocation cases. Any agency could petition the court to accept jurisdiction over trial and decision of any particular cases begun by the agency. The court would consist of nine members appointed by the President with Senate concurrence to serve 11-year terms.

APPENDIX 3–A

COMPARISON OF PROCEEDINGS CASES

(Backlog and age)

	Fiscal year					
	1965	*1966*	*1967*	*1968*	*1969*	*1970*
ICC:						
Backlog [1,2]	5,993	8,050	6,108	5,264	4,962	5,332
Percent change since 1965		+34.3	+1.9	−12.1	−17.2	−11.0
Average days to completion	286	219	265	286	262	242
FMC:						
Backlog [2,3]	40	65	73	109	49	94
Percent change since 1965		+62.5	+82.5	+172.5	+22.5	+135.0
Average days to completion [4]	542	493	397	468	523	509
CAB:						
Backlog [2,5]	848	933	1,174	1,349	991	998
Percent change since 1965		+10.0	+38.4	+59.0	+16.8	+17.6
Average days to completion [6]	326	306	362	421	285	306

[1] ICC annual reports 1967–70. In the period shown total proceedings cases and backlog have declined but the number of ICC cases over 4 years old has risen from 16 on Mar. 31, 1967, to 224 on Mar. 31, 1970.

[2] Backlog is limited here to docketed or filed proceedings cases at fiscal year end.

[3] FMC annual reports 1967–70.

[4] Docket records FMC. Confined to cases decided by commission and does not include rulemaking proceedings, special docket or informal docket.

[5] CAB annual reports 1966–67 and CAB Dockets Office.

[6] Office of Management Analysis, CAB.

NOTE.—In all 3 agencies, the number of proceedings cases has been reduced by modified hearing practices such as ad hoc proceedings and general application rules.

APPENDIX 3–B

COMPARISON OF GROWTH IN TRANSPORTATION TRAFFIC WITH EXPENDITURES AND PERSONNEL LEVELS OF THE ICC, CAB, AND FMC [1]

	1965	*1966*	*1967*	*1968*	*1969*
Gross national product:					
Amount (in billions)	654	721	769	828	901
Percent change from 1965		+10.2	+17.6	+26.6	+37.8
Intercity ton-miles:					
Amount (in billions)	1,638	1,747	1,765	1,838	1,900
Percent change from 1965		+6.7	+7.8	+12.2	+16.0
Intercity passenger miles:					
Amount (in billions)	920	971	1,021	1,081	1,129
Percent change from 1965		+5.5	+11.0	+17.5	+22.8
Interstate Commerce Commission:					
Expenditures (in thousands)	26,491	27,264	27,107	23,706	24,582
Percent change from 1965		2.9	2.3	−10.5	−7.2
Personnel [2]	1,998	1,953	1,929	1,899	1,802
Percent change from 1965		−2.3	−3.5	−5.0	−9.8
Civil Aeronautics Board:					
Expenditures (in thousands)	11,205	10,856	11,536	9,074	9,839
Percent change from 1965		−3.1	3.0	−19.0	−12.2
Personnel [2]	630	610	770	651	654
Percent change from 1965		−3.2	+22.2	+3.3	+3.8
Federal Maritime Commission:					
Expenditures (in thousands)	2,857	3,091	3,454	3,576	3,704
Percent change from 1965		8.2	20.9	25.2	29.6
Personnel	240	246	254	253	242
Percent change from 1965		+2.5	+5.8	+5.4	+0.8

[1] All data on fiscal year basis except for intercity ton-miles and passenger miles which are on a calendar year basis.

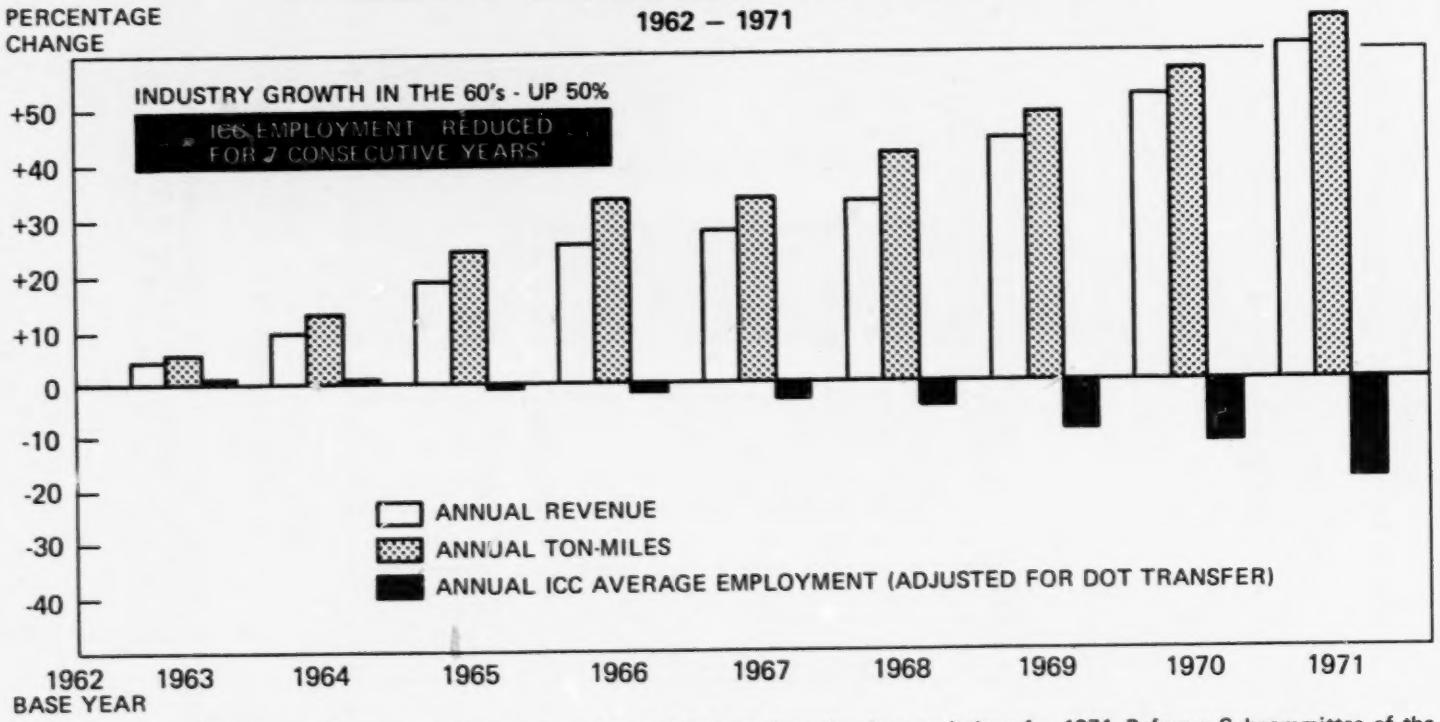
[2] Adjusted for ICC and CAB transfers to the Department of Transportation.

SOURCES: U.S. Budget and Appendix, 1967–72; Transportation Association of America, "Transportation Facts and Trends" (7th ed. 1970).

APPENDIX 3-B
Chart 1

PERCENTAGE CHANGES IN REGULATED INDUSTRY REVENUE & TON-MILES & ICC EMPLOYMENT

1962 – 1971

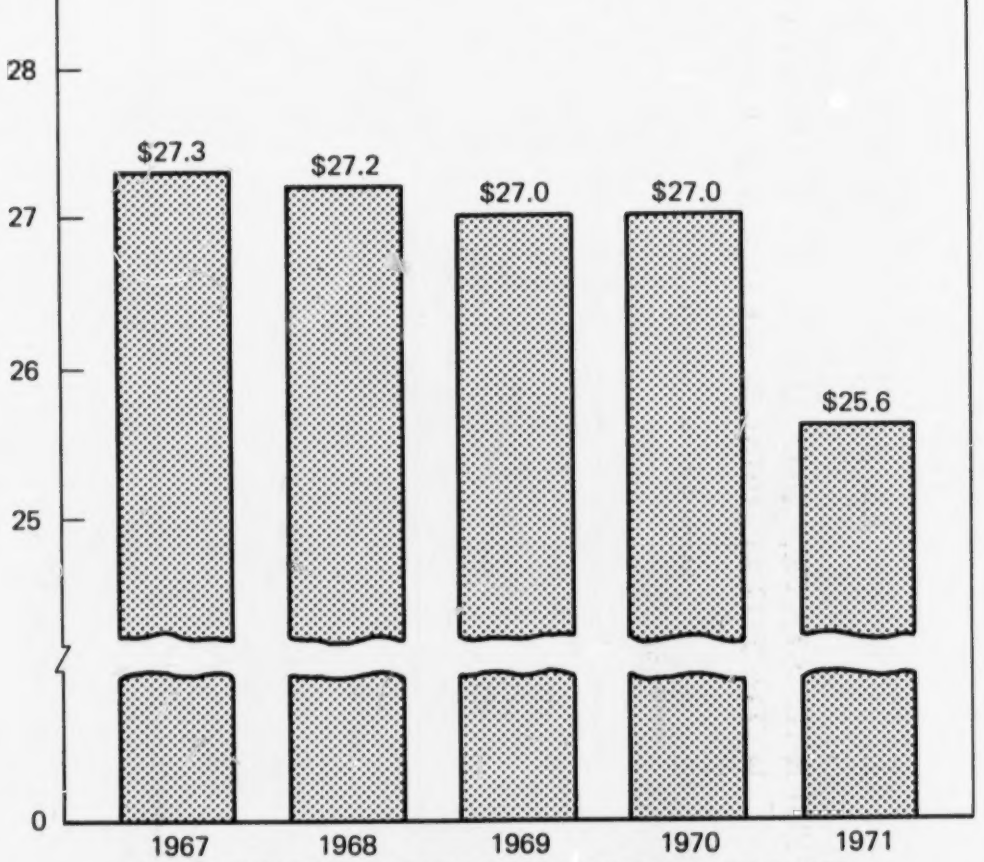


[Source: Hearings on Department of Transportation and Related Agencies Appropriations for 1971 Before a Subcommittee of the House Committee on Appropriations, Ninety-first Congress, 2d Sess., Pt. 3, 387 (1970).]

APPENDIX 3-B
Chart 2

COMPARISON OF ICC FUNDING LEVELS

FISCAL YEARS 1967 – 1971
(DATA ADJUSTED FOR COMPARABILITY FOR 1971*)



*ADJUSTMENTS FOR STATUTORY CHANGES — PAY RAISES, PER DIEM AND DEPARTMENT OF TRANSPORTATION TRANSFERS

[Source: Hearings on Department of Transportation and Related Agencies Appropriations for 1971 Before a Subcommittee of the House Committee on Appropriations, Ninety-first Congress, 2d Sess., pt. 3, 387 (1970).]

APPENDIX 3–C

COMPARISON OF FEDERAL, STATE, AND LOCAL TRANSPORTATION EXPENDITURES WITH TOTAL PUBLIC EXPENDITURES [1]

(Amounts in millions of dollars)

	1950		1955		1960		1965		1968		Percent change 1950–68
	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent	
Airways	115	2.4	108	1.4	429	3.7	652	4.3	699	3.7	507.8
Airports	145	3.1	128	1.7	421	3.7	510	3.3	614	3.3	323.4
Rivers and harbors	325	6.9	273	3.7	524	4.5	667	4.4	780	4.1	140.0
Highways	4, 155	87.7	6, 941	93.2	10, 160	88.1	13, 456	88.0	16, 741	88.9	302.9
Total public transportation expenditures	4, 740	100	7, 450	100	11, 534	100	15, 285	100	18, 834	100	297.3
Total public expenditures for all purposes	70, 334		109, 685		151, 288		205, 550		282, 645		301.9
Transportation as a percent of total public expenditures	6.7		6.8		7.6		7.4		6.7		

[1] Urban and high-speed ground transport Federal expenditures not included above: (1965) $11.1 million; (1968) $77.5 million.

SOURCES: Transportation Association of America, "Transportation Facts and Trends" (7th ed. 1970); other data supplied by Bureau of Census, Department of Commerce.

APPENDIX 3–D

INTERSTATE COMMERCE COMMISSION SELECTED COMPARISONS: AVERAGE EXPENDITURES OF EXAMINER HOURS IN HEARINGS,[1] REPORT PREPARATION,[2] AND REVIEW

Case type	*Average time per hearing (hours)*			*Average time for preparation of initial report (hours)*			*Average time for preparation of final report, order, dando (hours)*		
	1960	*1965*	*1970*	*1960*	*1965*	*1970*	*1960*	*1965*	*1970*
Motor carrier finance	11.6	12.6	17.9	86.9	120.7	148.8	50.5	48.1	35.8
Motor carrier operating authority	4.6	5.8	11.0	21.2	40.4	54.7	34.3	17.8	17.5
Motor carrier complaint	10.9	7.9	5.2	80.0	73.9	62.7	48.5	61.2	52.9
Formal docket (rate complaints and investigations)	14.5	13.2	25.5	99.8	107.4	74.4	69.6	121.6	59.9
Investigation and suspension (rail)	18.3	12.4	46.8	230.5	70.0	291.5	86.6	129.2	114.0
Investigation and suspension (motor)	8.3	11.8	51.8	115.8	118.6	137.7	50.3	57.1	47.1

[1] Excludes joint board hearings in which no commission personnel participated.

[2] Excludes short form reports.

SOURCE: ICC, "Tabulations and Analyses of Proceedings Cases," Central Status System, table 4.

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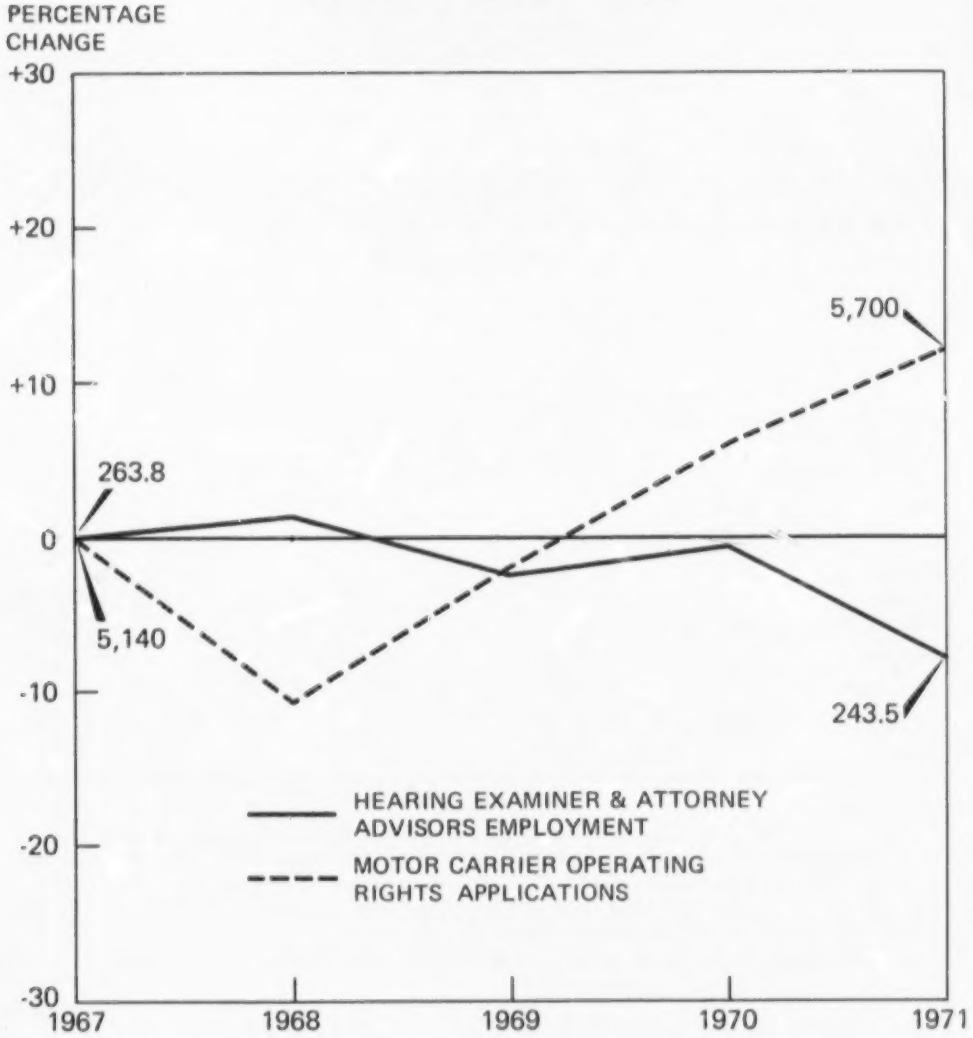
APPENDIX 3-E

PERCENTAGE CHANGES IN MOTOR CARRIER OPERATING RIGHTS APPLICATIONS AND ICC HEARING EXAMINER-ATTORNEY ADVISORS EMPLOYMENT LEVELS

FISCAL YEARS 1967 – 1971



[Source: Submission of Interstate Commerce Commission for fiscal 1971 budget request.]

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APPENDIX 3–F

Table 1

BUDGET, SELECTED WORKLOAD, AND PERSONNEL COMPARISONS FOR THE INTERSTATE COMMERCE COMMISSION

	Fiscal year					
	1965	*1966*	*1967*	*1968*	*1969*	*1970*
Expenditures (in thousands):						
Actual	26, 491	27, 264	27, 107	23, 706	24, 582	27, 464
Adjusted acutal [1]	26, 491	26, 380	25, 361	21, 058	20, 495	19, 331
Percent change from 1965 (adjusted actual)		−. 4	−4. 3	−20. 5	−22. 6	−28. 7
Workload:						
Cases [2]	9, 575	11, 572	7, 677	7, 465	7, 508	8, 334
Percent change from 1965		+20. 8	−19. 8	−22. 0	−21. 6	−13. 0
Personnel:						
Average	2, 399 [3]	1, 953	1, 929	1, 899	1, 808	1, 802
Percent change from 1965		−18. 6	−19. 6	−20. 8	−24. 6	−24. 9

[1] Personnel compensation has been adjusted for pay rate changes while remaining expenditures have been adjusted for inflation, both since 1965.

[2] The number of formal hearing cases has been reduced over a recent period of years by modified hearing practices. In spite of this, there has been an increase over the last 4 years in this type of case. The workload noted above is believed understated since the ICC also has responsibility for regulation of carrier rates, practices, operating authority, and finances; enforcement of statutes and regulations affecting transportation and carriers; and review of carrier accounting and statistics.

[3] Includes 401 positions later transferred to the Department of Transportation.

SOURCE: U.S. Budget and Appendix, 1967-72.

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APPENDIX 3–F

Table 2

BUDGET, SELECTED WORKLOAD, AND PERSONNEL COMPARISONS FOR THE FEDERAL MARITIME COMMISSION

	Fiscal year					
	1965	*1966*	*1967*	*1968*	*1969*	*1970*
Expenditures (in thousands):						
Actual	2,857	3,091	3,454	3,576	3,704	3,947
Adjusted actual [1]	2,857	2,985	3,232	3,177	3,088	2,776
Percent change from 1965 (adjusted actual)		+4.5	+13.1	+11.2	+8.1	−2.8
Workload:						
Docketed cases [2]	75	52	66	100	50	171
Percent change from 1965		−30.7	−12.0	+33.3	−33.4	+128.0
Personnel:						
Average	240	246	254	253	242	226
Percent change from 1965		+2.5	+5.8	+5.4	+.8	−5.8

[1] Personnel compensation has been adjusted for pay rate changes while remaining expenditures have been adjusted for inflation, both since 1965.

[2] Docketed cases are those cases formally received by the FMC's Office of Hearing Examiners and are illustrative of formal adjudication in the FMC. The above data is an understatement of the total FMC workload, which also includes administration of various shipping statutes, and regulation of domestic offshore and international waterborne commerce.

SOURCES: U.S. Budget and Appendix, 1967–72; Budget Submissions: Statistical Workload Summary, 1967–72.

APPENDIX 3–F

Table 3

BUDGET, SELECTED WORKLOAD, AND PERSONNEL COMPARISONS FOR THE CIVIL AERONAUTICS BOARD

	Fiscal year					
	1965	*1966*	*1967*	*1968*	*1969*	*1970*
Expenditures (in thousands):						
Actual	11, 205	10, 856	11, 536	9, 074	9, 839	11, 060
Adjusted actual [1]	11, 205	10, 516	10, 801	8, 063	8, 204	7, 778
Percent change from 1965 (adjusted actual)		−6. 1	−3. 6	−28. 1	−26. 8	−30. 6
Workload:						
Route cases [2]	68	73	85	91	116	83
Percent change from 1965		+7. 4	+25. 0	+33. 8	+70. 6	+22. 1
Personnel:						
Average	[3] 836	610	770	651	654	658
Percent change from 1965		−27. 0	−7. 9	−22. 1	−21. 8	−21. 3

[1] Personnel compensation has been adjusted for pay rate changes while remaining expenditures have been adjusted for inflation, both since 1965.

[2] One of the CAB's principal activities is the award of operating authority. Route cases are a measure of that activity and the above data shows an increase in formal hearing route cases. However, total workload encompasses other CAB activities, such as regulation of rates and fares, regulation of agreements and interlocking relationships, and subsidy support of air service. Thus, the above data is believed to understate the CAB's total workload.

[3] Includes 206 positions later transferred to the Department of Transportation.

SOURCE: U.S. Budget and Appendix, 1967–72.

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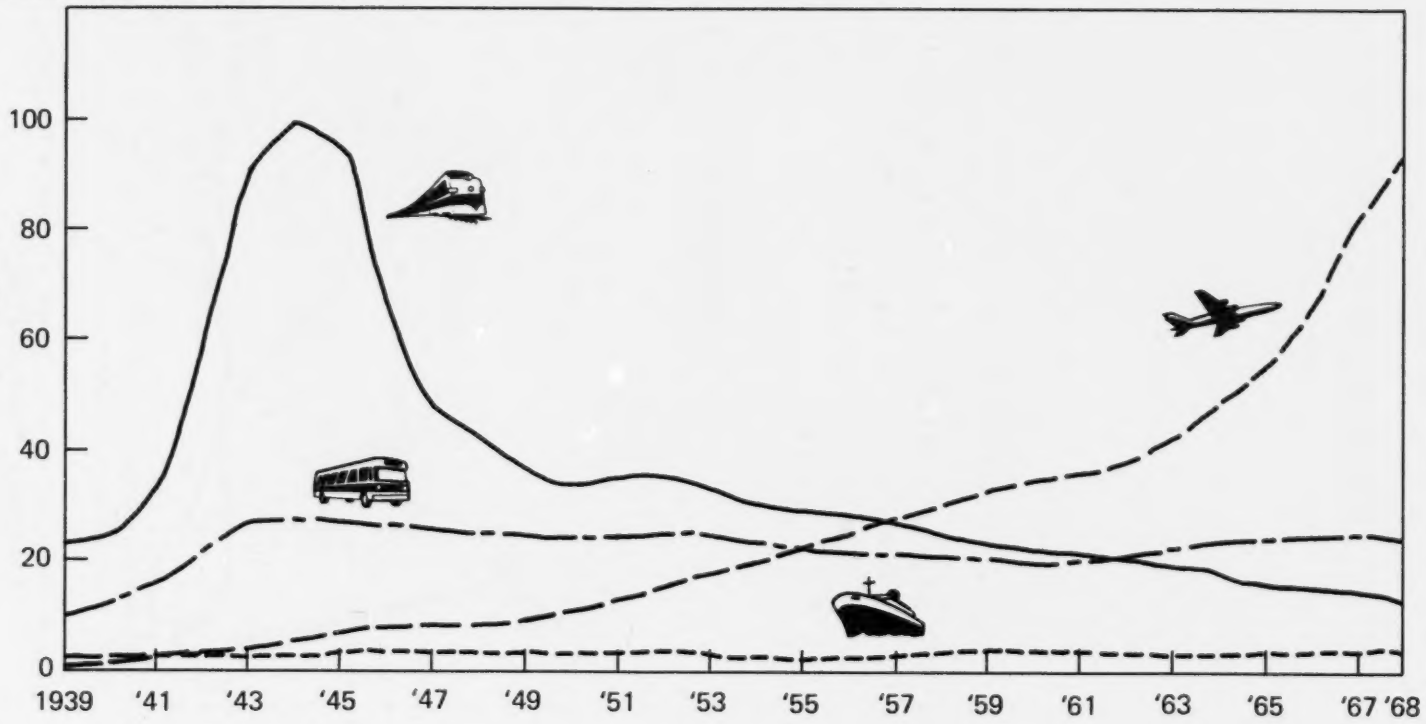
APPENDIX 3-G

TRAVEL BY PUBLIC CARRIER

1939 – 1968

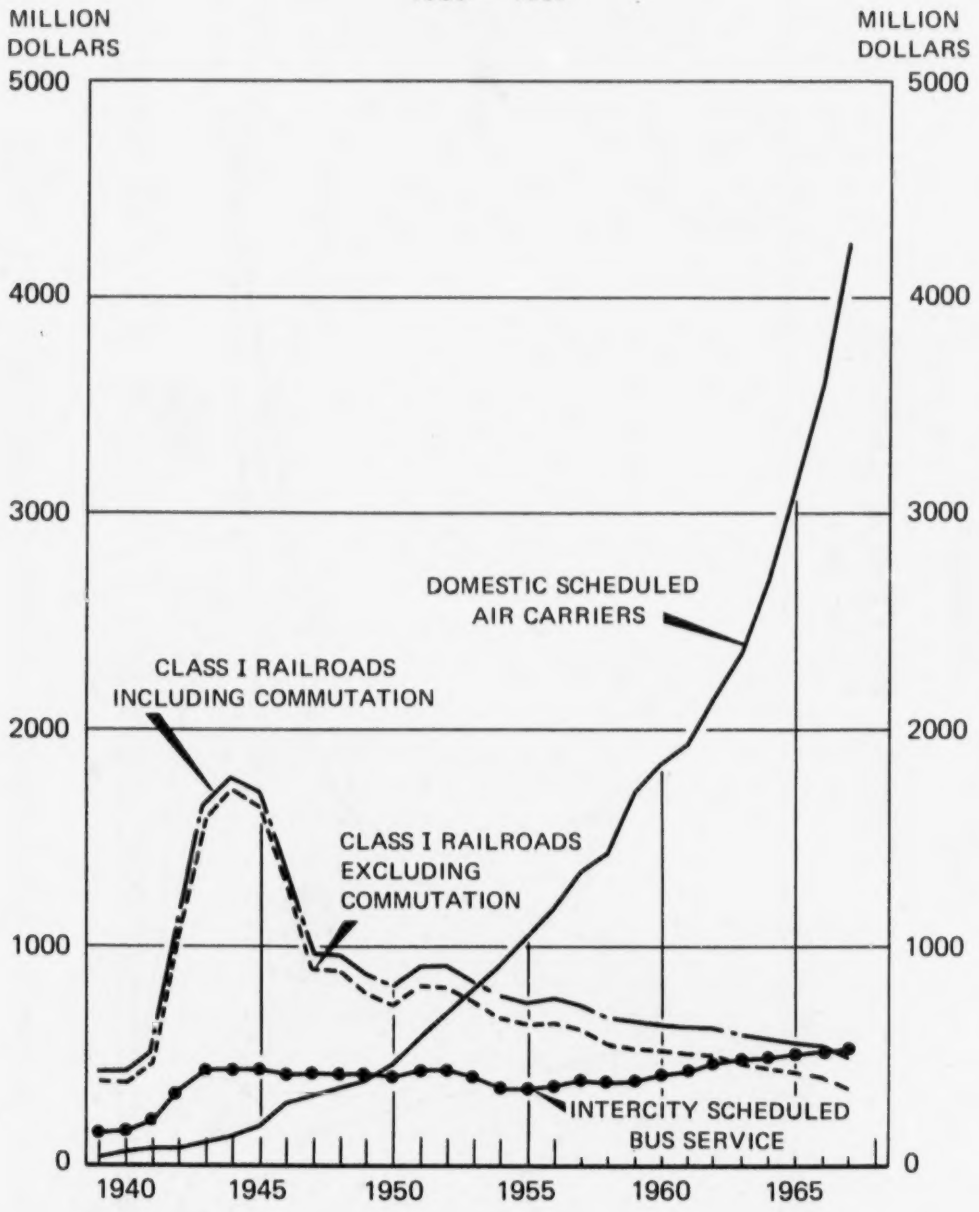


[Source: Transportation Association of America, Transportation, Facts and Trends 16 (7th ed. 1970).]

APPENDIX 3-H

PASSENGER REVENUES

1939 – 1967



[Source: Bureau of Economics, Interstate Commerce Commission, Transport Economics 9 (November, 1968).]

APPENDIX 3–I

INTERCITY FREIGHT BY MODES (INCLUDING MAIL AND EXPRESS) [1]

(In billions of ton-miles)

	Rail		*Truck*		*Oil pipeline*		*Great Lakes*		*Rivers and canals*		*Air*		*Total*
	Amount	*Percent*	*Amount*	*Percent*	*Amount*	*Percent*	*Amount* [2]	*Percent*	*Amount* [2]	*Percent*	*Amount*	*Percent*	
1940	379	61.3	62	10.0	59	9.5	96	15.5	22	3.6	0.02	0.00	618
1945	691	67.2	67	6.5	127	12.4	113	11.0	30	2.9	.09	.01	1,028
1950	597	56.2	173	16.3	129	12.1	112	10.5	52	4.9	.30	.03	1,063
1955	631	49.5	223	17.5	203	15.9	119	9.3	98	7.7	.49	.04	1,274
1960	579	44.1	285	21.8	229	17.4	99	7.5	121	9.2	.89	.07	1,314
1965	709	43.3	359	21.9	306	18.7	110 (76)	6.7	152 (110)	9.3	1.91	.12	1,638
1966	751	43.0	381	21.8	333	19.1	116 (81)	6.6	164 (117)	9.4	2.25	.13	1,747
1967	731	41.4	389	22.0	361	20.5	107 (75)	6.1	174 (128)	9.9	2.59	.15	1,765
1968	757	41.2	396	21.5	391	21.3	112 (75)	6.1	179 (139)	9.7	2.90	.16	1,838
1969 [3]	780	41.0	404	21.3	411	21.6	[4] 116 (79)	6.1	186 (146)	9.8	3.20	.17	1,900

[1] Includes both for-hire and private carriers.
[2] See source data for figures in parenthesis, which are based on different reporting techniques.
[3] Preliminary TAA estimate.
[4] Breakdown estimated by TAA.

SOURCE: Transportation Association of America, "Transportation, Facts and Trends" (7th ed, 1970).

APPENDIX 3–J

INTERCITY FREIGHT, FEDERALLY REGULATED

(Percent of ton-miles per mode)

Year	Rail	Truck	Oil pipeline	Water			Air	Total regulated		Regulated freight traffic regulated by the ICC (percent)
				Domestic deep sea	Great Lakes	Rivers and canals		Tons (in millions)	Miles (percent)	
1965	100	39.0	86.0	7.4	0.9	17.7	100	1,865	62.1	99+
1966	100	37.6	85.9	7.5	0.9	19.2	100	1,972	62.3	99+
1967	100	36.0	86.0	5.4	1.0	14.9	100	1,997	61.1	99+
1968	100	39.0	84.9	5.1	1.1	15.5	100	2,066	62.2	99+

INTERCITY PASSENGER TRAVEL, FEDERALLY REGULATED

(Percent of passenger miles per mode)[1]

Year	Private carrier (air and auto)	Public carrier				Total passenger miles		Regulated passenger traffic regulated by the ICC (percent)
		Air	Bus	Rail	Water	(in millions)	(Percent regulated)	
1965	0	100	100	100	100	920	10.7	55.3
1966	0	100	100	100	100	971	11.2	51.6
1967	0	100	100	100	100	1,021	12.1	35.2
1968	0	100	100	100	100	1,081	12.5	31.6

[1] Excludes intrastate passenger traffic.

SOURCE: Transportation Association of America, "Transportation Facts and Trends" (7th ed. 1970).

APPENDIX 3–K

AVERAGE LOAD CAPACITY, LOAD FACTOR, AND LENGTH OF HAUL OF CLASS I INTERCITY CARRIERS OF PASSENGERS

	1939	*1947*	*1950*	*1955*	*1960*	*1965*	*1968*
LOAD							
Average number of passengers (per unit):							
Air	8.3	19.5	22.7	32.6	38.3	48.8	52.9
Bus	14.3	19.6	18.2	18.4	17.9	19.2	18.8
Rail	13.4	21.0	17.0	17.8	19.4	23.2	22.9
Total passenger-miles (millions):							
Air	683	6,105	8,029	19,852	30,557	51,888	87,508
Bus	7,295	20,982	17,030	14,629	13,307	15,813	15,370
Rail	22,651	45,921	31,760	28,526	21,258	17,338	13,110
CAPACITY							
Average number of seats (per unit):							
Air	14.8	29.9	37.1	51.5	65.4	89.2	100.8
Bus	26.6	34.3	35.9	39.1	39.5	39.8	40.0
Rail	72.0	70.0	69.0	66.0	65.0	68.0	74.0
Total seat-miles (millions):							
Air	1,215	9,364	13,125	31,371	52,220	94,787	166,871
Bus	13,559	36,746	33,590	31,059	29,375	32,807	32,702
Rail	122,071	153,300	129,030	105,600	71,409	50,818	42,364
LOAD FACTOR [1]							
Air	56.2	65.2	61.2	63.3	58.6	54.7	52.5
Bus	53.8	57.1	50.7	47.1	45.3	48.2	47.0
Rail	18.6	30.0	24.6	27.0	29.8	34.1	30.9
LENGTH OF HAUL (miles)							
Air	394	474	461	519	583	614	651
Bus	54	46	52	65	78	94	92
Rail	85	111	128	129	139	125	95

[1] Load factor is the percent of capacity utilized; it is determined by dividing either the average number of passengers per unit by the average number of seats per unit or by dividing the total passenger-miles by the total seat-miles.

SOURCE: Transportation Association of America, "Transportation Facts and Trends" 15 (7th ed. 1970).

APPENDIX 3–L

PIGGYBACK AND CONTAINERIZATION TRENDS

Containerization is one of the most efficient methods yet found for shipping many types of products long distances. Piggyback or TOFC (trailer on flatcar) service refers to the transportation of cargo in highway trailers or van-size containers using both rail and motor carriers. Fishyback movement is the transportation of cargo in trailers or van-size containers by water carrier and by the facilities of another mode.

These movements combine the benefits of transport by truck with the long haul economies of rail or water transport. This service allows railroads and water carriers to be in a position to compete for traffic at locations not directly served by them and make available to motor carriers lower cost movement over long distances. The piggyback principle, which allows various combinations of intermodal freight movement, offers shippers and carriers lower costs and improved means for coordinating the service characteristics of several modes.

The growing importance of piggyback between 1955 and 1969 is indicated by table 1 which shows that rail piggyback carloadings are increasing as a percentage of total carloadings.

One of the largest container markets now emerging is that of maritime transportation, including both foreign commerce and domestic coastline, intercoastal, and offshore movements. It is estimated that the total van container fleet for U.S. foreign and domestic maritime transport will increase by 1977 by about 11 percent, with annual world container production reaching 53,500 units.[1]

The underlying demand for containerization has led to a growth of U.S. container ships (including those with partial capacity) in recent years. Table 2 shows that total container capacity increased over 300 percent between 1966 to 1969.

About 55 to 60 percent of the general cargo trade of the United States, based on 1965 shipments (which is 15 percent of total U.S. export/import cargo) is highly to moderately susceptible to containerization, according to trade sources. This indicates that at least 9 percent of the total export/import cargo of this country will be a market for immediate containerization with expanded technology, lower labor costs, systems development, one-port service, and the transferability of containers to other modes of transportation.

[1] Kaiser Aluminum, Inc., "Containerization, An Outlook to 1977."

APPENDIX 3–L

Table 1

COMPARATIVE TRAFFIC SUMMARY: CLASS I RAILROAD REVENUE CARLOADINGS AND PIGGYBACK CARLOADINGS, 1955–69

Year	*Revenue carloadings*		*Piggyback carloadings*		
	Amount	*Percent change from 1955 (decrease)*	*Amount*	*Percent of total carloadings*	*Percent change from 1955*
1955	37,636		168,000	(1)	
1960	30,441	(19.1)	554,000	1.8	229.8
1965	29,248	(22.3)	1,034,000	3.5	515.4
1969	28,292	(24.8)	1,344,000	4.8	700.0

[1] Negligible.

SOURCE: Association of American Railroads.

APPENDIX 3–L

Table 2

U.S.-FLAG CONTAINER SHIPS 1966–69

	June 1966	*June 1968*	*June 1969*	*Percent change 1966–69*
Number of container ships	40	70	79	97. 5
Container capacity[1]	9, 334	22, 569	33, 576	259. 7
Number of ships with partial capacity	29	88	103	255. 2
Container capacity	2, 322	9, 763	13, 554	483. 7
Total ships with container capacity	69	158	182	163. 8
Total container capacity	11, 656	32, 332	47, 130	304. 3

[1] Number of container units.

SOURCE: Compiled from data supplied by the Maritime Administration, Department of Commerce.

APPENDIX 3–M

TECHNOLOGICAL INNOVATIONS, INTERMODAL RELATIONSHIPS, AND GOVERNMENT PROMOTION THROUGH DIRECT SUBSIDY

Innovation	*ICC*	*FMC*	*CAB*	*Subsidy*
Air transportation:				
Jumbo jets	X	.....	X	X
Supersonic air transport	X	.....	X	X
Vertical lift aircraft	.....	.....	X	X
Highway transportation:				
Specialized trucks	X	X	.....	.....
Twin-trailer combinations	X	X	.....	.....
Exclusive bus roadways	X	.....	.....	X
Pollution free automobiles	.....	.....	.....	X
Containerization	X	X	X	.....
Pipeline transportation:				
Slurry pipelines	X	.....	.....	.....
Solid pipelines	X	.....	.....	.....
Rail transportation:				
Unit trains	X	.....	.....	.....
Piggyback service	X	X	X	.....
Jumbo freight cars	X	.....	.....	.....
Automated freight car control	X	.....	.....	.....
Auto on train	X	.....	X	.....
Highspeed intercity passenger rains	X	.....	X	X
Water transportation:				
Nuclear powered merchant ships	.....	X	.....	X
Large integrated tows	X	.....	.....	X
Barge carrying ships	X	X	.....	X
Container and roll-on/off ships	X	X	.....	X
Modernized shipbuilding	.....	X	.....	X
Hydrofoil ships	X	X	.....	X
Urban mass transportation (e.g., monorail, rapid rail transit, rail-bus systems)	X	.....	X	X
Air cushion vehicles (e.g., boats, trains)	X	X	X	X
Pipeline travel (e.g., gravity-vacuum, trains)	X	.....	X	X

X = Indicates regulatory agency involvement or Government subsidy by Department of Transportation, Maritime Administration, Department of Defense, or Atomic Energy Commission.

SOURCE: Compiled from Transportation Association of America, "Transport Technological Trends," (October 1970).

APPENDIX 4–A

Excerpt from:

Report of the ABA Commission to Study the Federal Trade Commission [1]

* * * The FTC of the 1960's is probably superior to most of its predecessors, but continues to fail in many respects. Through lack of effective direction, the FTC has failed to establish goals and priorities, to provide necessary guidance to its staff, and to manage the flow of its work in an efficient and expeditious manner.

All available statistical measures of FTC activity show a downward trend in virtually all categories of its activities in the face of a rising budget and increased staff. Moreover, present enforcement activity rests heavily on a voluntary compliance program devoid of effective surveillance or sanctions. It thus appears that both the volume and the force of FTC law enforcement have declined during this decade.

We believe that the FTC has mismanaged its own resources. Through an inadequate system of recruitment and promotion, it has acquired and elevated to important positions a number of staff members of insufficient competence. The failure of the FTC to establish and adhere to a system of priorities has caused a misallocation of funds and personnel to trivial matters rather than to matters of pressing public concern.

The primary responsibility for these failures must rest with the leadership of the Commission. In recent years, bitter public displays of dissention among Commissioners have confused and demoralized the FTC staff, and the failure to provide leadership has left enforcement activity largely aimless.

[1] Sept. 15, 1969, at 1–3 (footnotes omitted).

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Turning to specific areas of FTC efforts, we find, first, that in the field of consumer protection, the agency has been preoccupied with technical labeling and advertising practices of the most inconsequential sort. This failing derives in large part from a detection technique which relies almost exclusively on the receipt of outside complaints.

At the same time, the FTC has exercised little leadership in the prevention of retail marketing frauds. In this important field, the FTC has failed to build upon its most imaginative undertaking, the District of Columbia pilot project. Although emphasizing the need for State and local effort, the FTC has kept its Federal-State coordination program patently understaffed.

Unjustified doubts within the FTC as to its power or effectiveness in dealing with local frauds have caused it to remain largely passive in this area of enforcement.

We recommend a new and vigorous approach to consumer fraud. The FTC should establish task forces in major cities to concentrate exclusively on this problem. These task forces should be given ample manpower and authority to pursue localized frauds expeditiously and effectively.

We see in this project a source not only of improved enforcement but of substantially expanded knowledge as to the nature and significance of consumer fraud. We would expect the project to generate both new initiatives in the enforcement of the Federal Trade Commission Act and proposals for new legislation in the field of fraudulent and deceptive practices. Furthermore, it would establish new lines for communication and cooperation with State and local agencies. We also believe that effective law enforcement in this area requires the creation of new procedural devices, including a right in the FTC, in appropriate situations, to seek preliminary injunctions against deceptive practices, and some form of private relief for on behalf of consumers injured by such practices.

In the antitrust field, we believe that the FTC can perform valuable service in bringing the administrative process to bear on difficult and complex problems. We therefore propose that the concurrent jurisdiction of the FTC and the Department of Justice in antitrust enforcement be retained. We urge, however, that the present allocation of enforcement resources be reexamined and realigned in a manner more nearly consistent with the objectives of antitrust policy.

The work of the FTC's Bureau of Economics has been of substantial value. We think, however, that its public acceptance would be improved by a structural division into two separate units—one to provide support to the enforcement work of the FTC, and the other to engage in fundamental economic research.

Finally, we believe that several serious and pervasive deficiencies at the FTC must be acknowledged and corrected.

First, it is imperative that the FTC embark on a program to establish goals, priorities, and effective planning controls. We recommend establishment of a special staff committee to review the current backlog of pending matters and to recommend to the Commission the closing of files of marginal significance. We further propose the immediate expansion and invigoration of the Office of Program Review to take primary responsibility for proposing to the Commission ways and means of coordinating future operations.

Secondly, the agency must recognize that some of its most serious problems—such as excessive delay and the conflict at the Commissioner level between the functions of prosecutor and judge—can be solved by greater delegation of authority to the staff. We recommend that the Commission confer on its bureau directors the authority to issue complaints and close investigations, on its General Counsel the authority to seek preliminary injunctions, and on its projected consumer-protection task forces the authority to initiate and close investigations, issue complaints, and otherwise act as operating bureaus with respect to its own programs.

Third, Commissioners have been criticized for making themselves available to those representing respondents or potential respondents on an ex parte, off-the-record basis. The Commission should define and publish criteria concerning the circumstances under which businessmen and their attorneys may confer with Commissioners at all stages of its proceedings.

In conclusion, this Commission believes that it should be the last of the long series of committees and groups which have earnestly insisted that drastic changes were essential to recreate the FTC in its intended image. The case for change is plain. What is required is that the changes now be made, and in depth. Further temporizing is indefensible. Notwithstanding the great potential of the FTC in the field of antitrust and consumer protection, if change does not occur, there will be no substantial purpose to be served by its continued existence; the essential work to be done must then be carried on by other governmental institutions.

APPENDIX 4–B

Excerpt from:

Report of the ABA Commission to Study the Federal Trade Commission [1]

The Bureau of Textiles and Furs is engaged exclusively in the enforcement of four statutes: the Wool Products Labeling Act (Wool Act), the Textile Fiber Products Identification Act (Textile Act), the Fur Products Labeling Act (Fur Act) and the Flammable Fabrics Act. Of these, the first three are primarily aimed at protecting producers rather than consumers. We do not fault the FTC for enforcing these protectionist statutes. It is the judgment of Congress that these industries deserve some protection from competition, and it is neither our province, nor that of the FTC, to repeal the statutes. We believe, however, that in allocating its resources along the whole spectrum of social problems which the agency could attempt to ameliorate, the FTC has given inordinate attention to these areas. Moreover, the FTC's enforcement effort again has focused on trivial matters which bear little or no functional relationship either to the protection of competitors or the protection of consumers.

For example, in *Marcus* v. *FTC,* the FTC found a violation of the act because of mislabeling on four wool blankets. One was labeled 70 percent wool and 30 percent rayon when it actually contained 79 percent wool, 5.9 percent nylon and various other fabrics, and a second was labeled 90 percent wool and 10 percent nylon, when it in fact had 93.7 percent wool. The FTC complained because the blanket labels understated the amount of wool, but the Court of Appeals found that understatement of

[1] Sept. 15, 1969, at 45–46 (footnotes omitted).

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wool content was not a violation. Another blanket was labeled 90 percent wool, but in fact had 89.9 percent and that label was held valid by the court as an "unavoidable variation in manufacture." The fourth blanket was labeled 100 percent wool when in fact it contained 14.3 percent residue other than wool, and this was held to be a meaningful variation. Since the respondent had sold over 1 million blankets during the period under investigation, the court concluded that the variations found did not constitute sunbstantial evidence of misbranding.

Typical cases enforcing the Textile Act involve sleeping bags that were labeled "all acetate" but were found to contain "substantially less," or men's trousers that were labeled 75 percent dacron-polyester and 25 percent cotton whereas "substantially less dacron" was present. There are probably some consumer protection advantages that result from enforcement of the Textile Act. Most consumers cannot tell by sight or touch whether a textile is, for example, 60 percent cotton and 40 percent dacron, or contains other fibers, and the Act requires that the label disclose that information. For a sophisticated shopper, such information is relevant. On the other hand, the consumer interested in more practical considerations, such as durability, shrinkage, launderability, and warmth, needs to be told how these qualities relate to fiber content.

In enforcing the Fur Act, the FTC has adopted rules which provide that all information on the label must be in English, forbid the use of abbreviations on the label, and limit the minimum size of labels and the size of type that may be used on the label. Other rules prevent fictitious price comparisons, fraudulent claims of value, and bogus going-out-of-business sales. The following list of violations, taken from a report of a case that eventually reached the court of appeals, is some indication of the kind of infractions that may occur:

> A few hand written labels containing (in addition to the required data) nonrequired words "fur name" on the same side; one garment with no fur identification; a hand written label which omitted the information that the fur was dyed and which contained the nonrequired words "romance flank muskrat"; more than 30 labels containing nonrequired words, e.g., "romance" and "fur name"; several labels omitting the information that the fur was dyed; about 10 labels omitting the name or registered number of the marketer; several labels omitting the name of the mink trimming used on the garment of another fur; more than a dozen labels having the words "Southwest Africa" abbreviated as "S.W. Africa"; and several labels or garments of persian lamb in which the word "lamb" was omitted.

It is difficult to justify such literal-minded enforcement of this statute by the Bureau of Textiles and Furs. Many of the trivial violations found

in the literal text of labels, invoices and advertising are hardly relevant to any serious consumer interest. Indeed, if the misleading information were deceptive in a significant way—for example, if rabbit were labeled as persian lamb—section 5 would be available to prevent continuation of such practices.

The fourth statute enforced by the Bureau of Textiles and Furs is the Flammable Fabrics Act, passed in 1953, and amended in 1967. It is not a labeling or disclosure statute, but directly prohibits the manufacture and marketing of any wearing apparel that does not conform to standards promulgated by the Secretary of Commerce. The Act resulted from a number of highly publicized incidents in the early 1950's involving severe burning of children by highly flammable children's cowboy playsuits and so-called torch sweaters, and was amended in 1967 to allow for more flexibility in standards and to broaden the coverage of the Act to include household furnishings, draperies and blankets.

Time and effort devoted by the Bureau of Textiles and Furs to enforcement of this statute has been relatively minor compared to enforcement of the three labeling statutes. Of all Textile and Fur Bureau cases on the FTC docket in July 1962, 13.3 percent involved violations of the Flammable Fabrics Act. The percentage rose to 30 percent in 1964 and dropped to 5.6 percent in 1966 and 5.8 percent in 1967. By 1968 it was up to 16 percent. Budget allocations for Flammable Fabrics Act enforcement have run at about 10 percent of total textile and fur allocations over the last 5 years—compared to about 40 percent per year for Textile Act enforcement during the same period.

APPENDIX 4–C

Table 1

BUDGET, SELECTED WORKLOAD, AND PERSONNEL COMPARISONS FOR THE FEDERAL TRADE COMMISSION

	Fiscal year					
	1965	*1966*	*1967*	*1968*	*1969*	*1970*
Expenditures (in thousands):						
Actual	13,662	13,648	14,108	15,221	16,402	19,928
Adjusted actual [1]	13,662	13,180	13,196	13,519	13,674	14,053
Percent change from 1965 (adjusted actual)		−3.5	−6.7	−1.1	+0.1	+2.9
Workload:						
Complaints issued [2]	161	194	221	123	220	241
Percent change from 1965		+20.4	+37.3	−24.6	+36.6	+49.7
Personnel:						
Average	1,145	1,127	1,119	1,197	1,185	1,302
Percent change from 1965		−1.6	−2.3	+4.5	+3.5	+13.7

[1] Personnel compensation has been adjusted for pay rate changes while remaining expenditures have been adjusted for inflation, both since 1965.

[2] "Complaints issued" is believed to be illustrative, but an understatement, of FTC workload. Applications for complaint, an indicator not subject to commission control, shows a 340 percent increase since 1965. The FTC has additional responsibility to conduct investigations, issue cease and desist orders, compliance orders, and trade regulations, and to conduct antitrust activities.

SOURCE: U.S. Budget and Appendix, 1967–72.

APPENDIX 4–C

Table 2

FEDERAL TRADE COMMISSION

	Fiscal year									
	1961	*1962*	*1963*	*1964*	*1965*	*1966*	*1967*	*1968*	*1969*	*1970*
Seven Digit Investigations Opened										
Restraint of trade	884	741	301	351	236	249	352	218	181	180
Deceptive practices	899	897	854	686	615	748	666	388	192	260
Textiles and furs	241	157	156	346	216	160	174	146	238	242
Total	2, 024	1, 795	1, 311	1, 383	1, 067	1, 157	1, 192	752	611	682
Seven Digit Investigations Completed										
Restraint of trade	336	709	346	467	729	492	321	196	289	402
Deceptive practices	896	788	764	837	706	795	546	522	498	609
Textiles and furs	195	180	202	253	275	186	191	166	167	214
Total	1, 427	1, 677	1, 312	1, 557	1, 710	1, 473	1, 058	884	954	1, 225
Seven Digit Investigations: Total Workload										
Restraint of trade					1, 659	1, 181	1, 046	943	933	826
Deceptive practices					1, 832	1, 882	1, 756	1, 598	1, 279	1, 097
Textiles and furs					502	388	376	333	406	482
Total					3, 993	3, 451	3, 178	2, 874	2, 618	2, 405

SOURCE: Federal Trade Commission, Workload and Manpower Reports, 1960–70.

APPENDIX 4–C

Table 3

FEDERAL TRADE COMMISSION

	Fiscal year									
	1961	*1962*	*1963*	*1964*	*1965*	*1966*	*1967*	*1968*	*1969*	*1970*
Complaints Issued by the Commission										
Restraint of trade	121	49	230	95	26	94	24	16	28	24
Deceptive practices	177	93	127	129	66	48	108	45	65	75
Textiles and furs	115	91	74	85	69	52	89	62	127	140
Total	413	233	431	309	161	194	221	123	220	239
Orders To Cease and Desist Issued by the Commission										
Restraint of trade	103	92	261	136	39	94	30	23	27	18
Deceptive practices	180	176	118	161	67	51	96	53	68	71
Textiles and furs	92	143	75	88	69	51	89	62	126	139
Industry guidance										2
Total	375	411	454	385	175	196	215	138	221	230

SOURCE: Federal Trade Commission, Workload and Manpower Reports, 1960–70.

APPENDIX 4–D

FEDERAL TRADE COMMISSION: COMPLIANCE

	Fiscal year				
	1965	*1966*	*1967*	*1968*	*1969*
Orders to cease and desist issued in 10 preceeding years	2, 975	2, 844	2, 866	2, 908	2, 758
Supplemental compliance reports received:					
Deceptive practices	14	33	49	14	19
Restraint of trade	45	27	14	15	14
Textiles and furs	33	48	23	18	33
Total	92	108	86	47	66
Compliance investigations initiated:					
Deceptive practices	62	107	49	77	77
Restraint of trade	19	49	33	23	22
Textiles and furs	30	30	32	41	67
Total	111	186	114	141	166
Total of supplemental reports and investigations	203	294	200	188	232
Percentage of orders checked	6. 82	10. 33	6. 97	6. 46	8. 41
Certified to Justice Department for civil penalty or enforcement proceedings:					
Deceptive practices	2	7	3	3	5
Restraint of trade	3	2	2	.....	2
Textiles and furs	2	6	.....	3	4
Total	7	15	5	6	11

SOURCE: Federal Trade Commission, Workload and Manpower Reports, 1965–69.

APPENDIX 5–A

REGISTRATIONS EFFECTIVE UNDER THE SECURITIES ACT OF 1933 (1935–69)

Fiscal year	*Number of statements* [1]	*Value (in millions)*
1935 [2]	284	$913
1940	306	1,787
1945	340	3,225
1950	487	5,307
1955	779	10,960
1960	1,426	14,367
1965	1,266	19,437
1966	1,523	30,109
1967	1,649	34,218
1968	[3] 2,417	[3] 54,076
1969	[4] 3,645	[4] 86,810

[1] Statements registering American Depositary Receipts against outstanding foreign securities as provided by form S–12 are included.

[2] For 10 months ended June 30, 1935.

[3] Includes 3 statements registering lease obligations relating to industrial revenue bonds of $140 million.

[4] Includes 8 statements registering lease obligations relating to industrial revenue bonds of $354 million.

SOURCE: 35 SEC Ann. Rep. (1969).

APPENDIX 5–B

FILINGS AND REPORTS VS. AVAILABLE MANPOWER

(Division of Corporate Finance of the SEC)

	Fiscal year						
	1963	*1964*	*1965*	*1966*	*1967*	*1968*	*1969*
Division personnel (average employment)	286	266	250	254	258	265	250
Registration statements	1,159	1,192	1,163	1,379	1,534	2,473	4,170
Annual reports (sec. 10–K)	4,373	4,530	4,646	5,263	5,645	5,594	6,064
Semiannual reports (sec. 9–K)	3,608	3,652	3,588	4,214	4,421	4,625	4,812
Current reports (sec. 8–K)	6,744	7,410	7,987	8,538	8,760	9,870	10,972
Ownership reports	41,807	44,631	56,554	96,232	85,283	93,823	93,708
Preliminary proxy statements	2,463	2,582	2,298	3,996	4,385	4,947	5,111

SOURCE: Hearings on Independent Offices and Department of Housing and Urban Development Appropriations for 1971 before a Subcommittee of the Committee on Appropriations, House of Representatives, 91st Cong., 2d Sess., pt. 2, at 1142 (1970).

APPENDIX 5–C

MEDIAN TIME REQUIRED TO COMPLETE REGISTRATION UNDER THE SECURITIES ACT OF 1933

	1965	*1966*	*1967*	*1968*	*1969*
Days	36	38	36	44	[1] 65

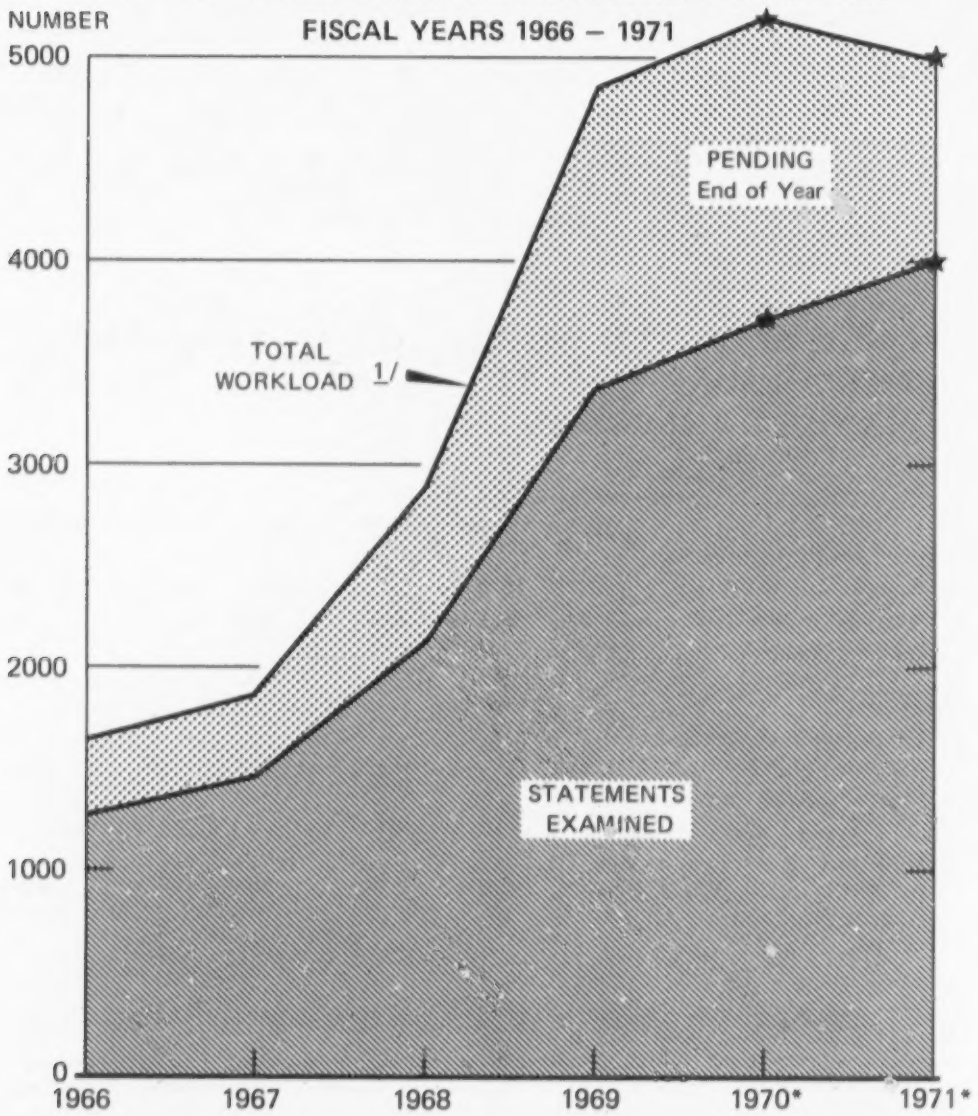
[1] Median time for registrations commenced in March 1969 was 76 days.

SOURCE: 33 SEC Ann. Rep. 25 (1967); 35 SEC Ann. Rep. 32 (1969).

APPENDIX 5-D

REGISTRATION STATEMENTS

FROM COMPANIES OTHER THAN INVESTMENT COMPANIES



* Estimated

1/ Represents pending at the beginning of the year plus filed during the year.

[Source: Hearings on Independent Offices and Department of Housing and Urban Development Appropriations for 1971 Before a Subcommittee of the House Committee on Appropriations, Ninety-first Congress, 2d Sess., pt. 2, 1097 (1970).]

APPENDIX 5–D

Table 1

BUDGET, SELECTED WORKLOAD, AND PERSONNEL COMPARISONS FOR THE SECURITIES AND EXCHANGE COMMISSION

	Fiscal year					
	1965	*1966*	*1967*	*1968*	*1969*	*1970*
Expenditures (in thousands):						
Actual	15,276	15,820	16,681	17,642	18,550	21,513
Adjusted actual [1]	15,276	15,281	15,610	15,680	15,475	15,158
Percent change from 1965 (adjusted actual)		+.0	+2.2	+2.6	+1.3	−.8
Workload:						
Examination of registration statements [2]	1,110	1,330	1,494	2,141	3,371	3,519
Percent change from 1965		+19.8	+34.6	+92.9	+203.7	+217.0
Personnel:						
Average	1,393	1,372	1,360	1,370	1,317	1,388
Percent change from 1965		−1.5	−2.4	−1.6	−5.5	−.4

[1] Personnel compensation has been adjusted for pay rate changes while remaining expenditures have been adjusted for inflation, both since 1965.

[2] Issuers of securities for public sale are required to file a registration statement with the SEC in order to assure that investors will be provided with the material facts concerning security offerings. The above data represents examination of registration statements from companies other than investment companies. The increase in workload above is believed understated since the SEC has additional workload responsibility in prevention and suppression of fraud, supervision and regulation of securities markets, and regulation of investment and public utility holding companies.

SOURCE: U.S. Budget and Appendix, 1967-72.

APPENDIX 5–E

PERCENTAGE DISTRIBUTION OF PUBLIC VOLUME TRADING ON THE NEW YORK STOCK EXCHANGE [1]

	Public individuals		*Institutions and intermediaries*	
	Shares	*Value*	*Shares*	*Value*
1960	68.6	60.2	31.4	39.8
1966	57.0	52.5	43.0	47.5
1969	44.1	38.1	55.9	61.9

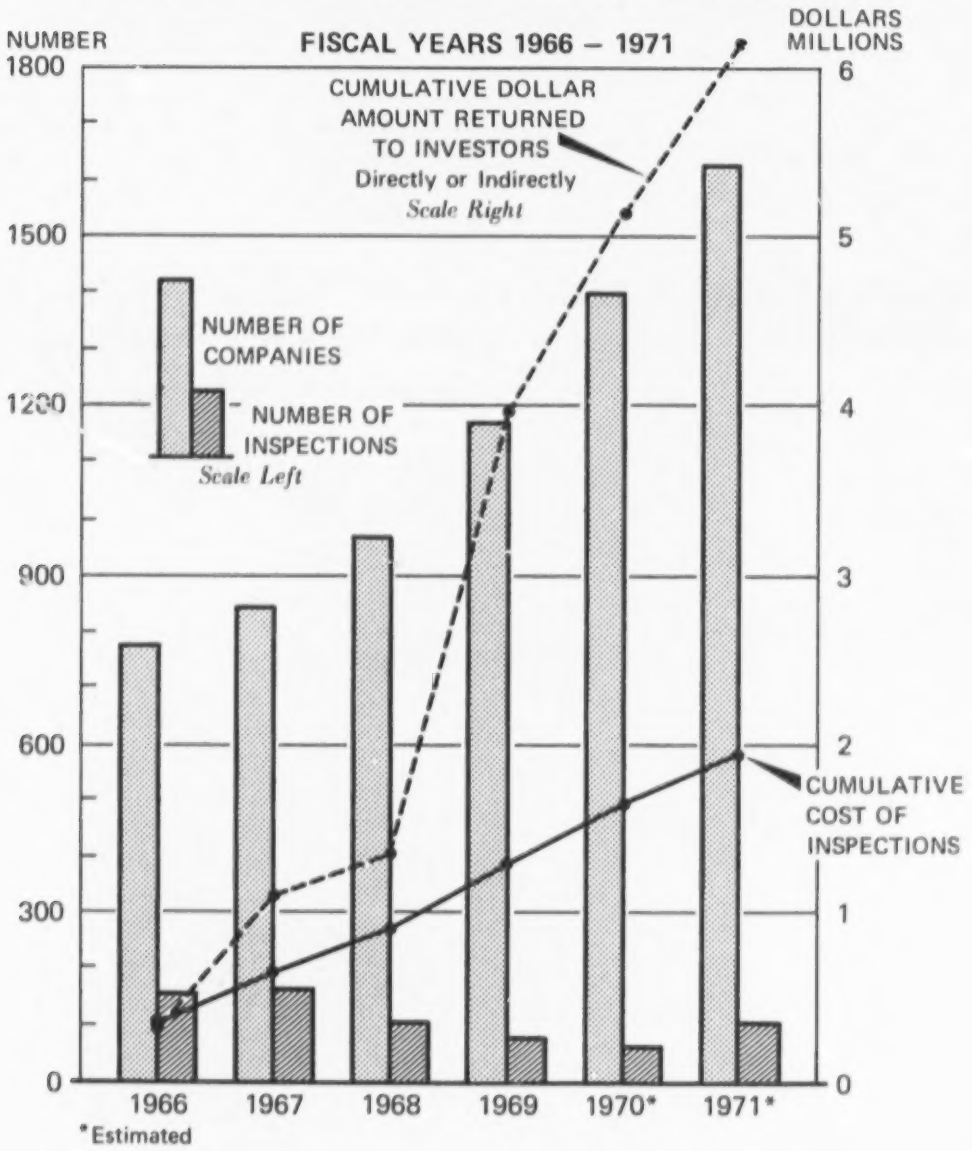
[1] Excludes member trading.

SOURCE: Research Department—NYSE, "Public Transaction Study 1969" at 9 (1970).

APPENDIX 5-F

INVESTMENT COMPANY INSPECTIONS

NUMBER OF INSPECTIONS AND COST VS. DOLLAR AMOUNT RETURNED TO INVESTORS DIRECTLY OR INDIRECTLY



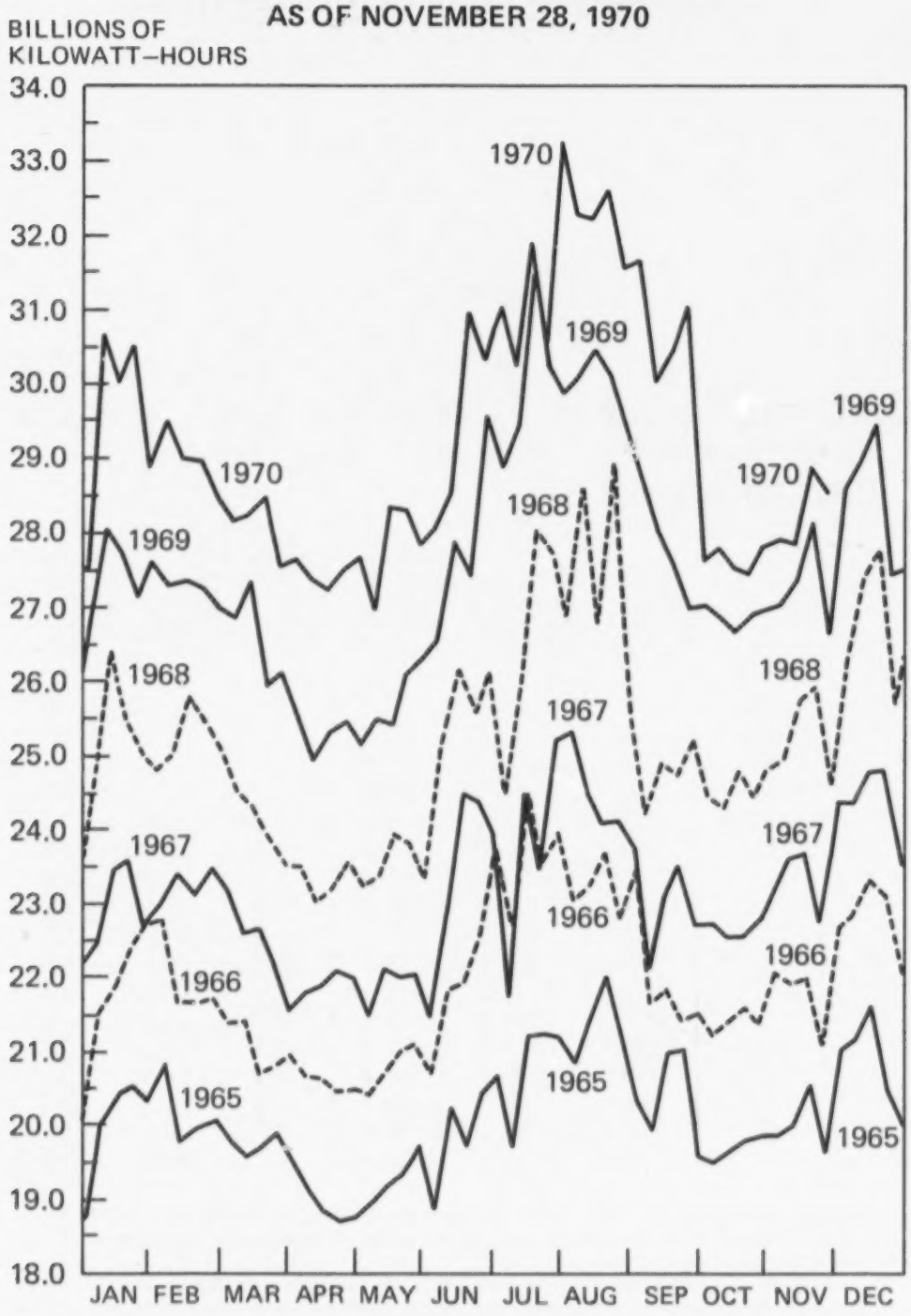
[Source: Hearings on Independent Offices and Department of Housing and Urban Development Appropriations for 1971 Before a Subcommittee of the House Committee on Appropriations, Ninety-first Congress, 2d Sess., pt. 2, 1102 (1970).]

APPENDIX 6-A

UNITED STATES

WEEKLY ELECTRIC OUTPUT

AS OF NOVEMBER 28, 1970



[Source: Federal Power Commission, News Digest, Dec. 3, 1970 (Based on Edison Electric Institute Data).]

APPENDIX 6–A

Table 1

ELECTRIC UTILITY CAPACITY AND ENERGY REQUIREMENTS WITHIN THE CONTIGUOUS UNITED STATES

Calendar year	Installed capacity [1] (millions of kilowatts)	Dependable capacity [1] (millions of kilowatts)	Peak load [2] (millions of kilowatts)	Indicated reserves [3]		Energy production (billions of kilowatt hours)
				Millions of kilowatts	Percent of peak load	
1990 (estimated)			1,051.0			5,828.0
1985 (estimated)			766.0			4,246.0
1980 (estimated)			554.0			3,075.0
1975 (estimated)			398.0			2,186.0
1970 (estimated)			277.0			1,522.0
1968 (preliminary)	283.3	277.9	242.5	35.4	14.6	1,322.7
1967 (revised)	264.9	260.5	216.1	44.4	20.5	1,210.6
1966	241.4	238.1	205.1	33.0	16.1	1,140.9
1965	232.3	229.4	189.0	40.4	21.4	1,052.1
1964	220.5	217.4	178.6	38.8	21.7	981.0
1963	207.2	204.9	167.1	37.8	22.6	914.1
1962	189.8	194.1	157.1	37.0	23.6	852.3
1961	117.9	183.8	144.5	39.3	27.2	792.0
1960	166.9	170.1	138.0	32.1	23.3	753.4
1955	113.6	117.7	102.5	15.2	14.8	547.0
1950	68.9	68.7	64.3	4.4	6.8	329.1
1945	50.1	47.5	39.4	8.1	20.6	222.5
1940	39.9	36.2	29.1	7.1	24.4	141.8

[1] Year-end capacity from 1940 to 1950, inclusive; thereafter the figures represent the sum of the capacities of each of the 8 Federal Power Commission power supply regions at the end of the month in which each regional annual peak load occurred.

[2] Sum of the December peak loads of each region from 1940 to 1950, inclusive; thereafter the figures represent the sum of the individual peak loads of each region for the month in which each regional annual peak load occurred.

[3] "Reserve margins amounting to 15 or 20 percent of expected peak load demand generally are considered necessary to compensate for forced outages * * *" (FPC release No. 16755 at 1.)

SOURCE: 49 FPC Ann. Rep. 10 (1969).

APPENDIX 6–B

ANNUAL U.S. NATURAL GAS PRODUCTION AND RESERVES [1]

Year	*Production*	*Year end reserves*	*Reserve to production ratio*	*Reserve additions*	*Finding to production ratio*
	(All volumes in billions of thousand-cubic feet at psia and 60° F.)				
1946	4.9	159.7	[1] 32.5	17.6	3.6
1950	6.9	184.5	26.9	12.0	1.8
1955	10.1	222.5	22.1	22.0	2.2
1960	13.0	262.2	20.1	14.1	1.1
1965	16.3	284.5	17.5	21.3	1.3
1966	17.5	286.4	16.4	19.4	1.1
1967	18.4	289.3	15.7	21.3	1.2
1968	19.3	282.1	14.6	12.1	0.6
1969	20.6	269.9	13.1	8.4	.4
			(Projected)		
1970	21.6	277.6	12.8	18.7	.87
1971	22.9	273.4	11.9	18.7	.82
1972	24.2	267.9	11.1	18.7	.77
1973	25.6	261.0	10.2	18.7	.73

[1] Excluding Alaska.

SOURCES: Remarks of John N. Nassikas, Chairman, FPC, to the 2d International Conference on LNG, "A Regulator's View of the Growing LNG Industry" 8 (Paris, France, Oct. 19-[illegible] 1970); Bureau of Natural Gas, Federal Power Commission, "A Staff Report on National Gas Supply and Demand" 11 (September 1969).

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APPENDIX 6–C

FEDERAL POWER COMMISSION: FORMAL CASE WORKLOAD [1]

Fiscal year	*On hand July 1*	*Initiated*	*Total workload*	*Completed*	*Pending June 30*
Pipeline Certificate Cases: [2]					
1965	7	15	22	13	9
1966	9	30	39	8	31
1967	31	15	46	17	29
1968	29	27	56	29	27
1969	27	23	50	15	35
1970	35	13	48	16	32
Pipeline Rate Cases: [3]					
1965	17	15	32	10	22
1966	22	14	36	5	31
1967	31	1	32	4	28
1968	28	16	44	15	29
1969	29	25	54	16	38
1970	38	28	66	15	51
Producer Rate Cases: [4]					
1965	3	0	3	0	3
1966	3	0	3	0	3
1967	3	1	4	0	4
1968	4	2	6	0	6
1969	6	1	7	1	6
1970	6	2	8	0	8

[1] Set for formal hearing by the Federal Power Commission.
[2] Pipeline construction, expansion, abandonment, connection.
[3] Rates, service provisions, complaints.
[4] Consolidated area rate proceedings.

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FEDERAL POWER COMMISSION: FORMAL WORKLOAD (Continued)

Fiscal year	*On hand July 1*	*Initiated*	*Total workload*	*Completed*	*Pending June 30*
Hydroelectric cases: [5]					
1965	4	1	5	2	3
1966	3	1	4	2	2
1967	2	4	6	1	5
1968	5	4	9	3	6
1969	6	4	10	2	8
1970	8	1	9	3	6
Electric utility cases: [6]					
1965	26	8	34	8	26
1966	26	8	34	9	25
1967	25	7	32	7	25
1968	25	9	34	6	28
1969	28	9	37	9	28
1970	28	5	33	5	28
Total cases:					
1965	57	39	96	33	63
1966	63	53	116	24	92
1967	92	28	120	29	91
1968	91	58	149	53	96
1969	96	62	158	43	115
1970	115	49	164	39	125

[5] Licensed projects and headwater determinations.
[6] Electric rates, service provisions, jurisdiction, interconnections, mergers, security issues.

SOURCE: FPC, Aug. 5, 1970.

APPENDIX 6–D

FUEL USE BY ELECTRIC UTILITIES

(Percent and projected)

	1968 [1]	*1969* [1]	*1970* [2]	*1980* [2]	*1990* [2]
Coal	61.9	59.2	55.0	41.9	28.7
Gas	27.5	28.0	27.6	14.4	9.4
Oil	9.4	11.6	14.6	12.1	6.8
Nuclear	1.1	1.0	2.8	31.6	55.1
Total	100	100	100	100	100

[1] Remarks of John N. Nassikas, Chairman, FPC, before the 1970 Convention of the American Gas Association (New Orleans, La., Oct. 12, 1970).
[2] Remarks of Chairman Nassikas before the Electrical World Conference for Utility Executives (Washington, D.C., Aug. 10, 1970).

APPENDIX 6–E

BUDGET, SELECTED WORKLOAD, AND PERSONNEL COMPARISONS FOR THE FEDERAL POWER COMMISSION

	Fiscal year					
	1965	*1966*	*1967*	*1968*	*1969*	*1970*
Expenditures (in thousands):						
Actual	13,081	14,067	14,220	14,563	15,666	17,848
Adjusted actual [1]	13,081	13,595	13,305	12,933	13,060	12,593
Percent change from 1965 (adjusted actual)		+3.9	+1.7	−1.1	−0.2	−3.7
Workload:						
Cases [2]	96	116	120	149	158	164
Percent change from 1965		+20.8	+25.0	+55.2	+64.6	+70.8
Personnel:						
Average	1,111	1,092	1,131	1,109	1,080	1,097
Percent change from 1965		−1.7	+1.8	−0.2	−2.8	−1.3

[1] Personnel compensation has been adjusted for pay rate changes while remaining expenditures have been adjusted for inflation, both since 1965.

[2] The above data represents the formal cases set for hearing.

SOURCES: U.S. Budget and Appendix, 1967-72; other data provided by the FPC's Fiscal and Budget Division.

APPENDIX 7–A

BUDGET, SELECTED WORKLOAD, AND PERSONNEL COMPARISONS FOR THE FEDERAL COMMUNICATIONS COMMISSION

	Fiscal year					
	1965	*1966*	*1967*	*1968*	*1969*	*1970*
Expenditures (in thousands):						
Actual	16,747	17,217	17,965	18,652	20,278	23,639
Adjusted actual [1]	16,747	16,633	16,809	16,570	16,912	16,310
Percent change from 1965 (adjusted actual)		−0.7	+0.4	−1.1	+1.0	−2.6
Workload:						
Stations regulated [2]	10,228	10,799	11,481	11,917	12,359	12,572
Percent change from 1965		+5.6	+12.2	+16.5	+20.8	+22.9
Personnel:						
Average	1,482	1,465	1,458	1,470	1,458	1,511
Percent change from 1965		−1.2	−1.6	−0.8	−1.6	+2.0

[1] Personnel compensation has been adjusted for pay rate changes while remaining expenditures have been adjusted for inflation, both since 1965.

[2] The FCC licenses and regulates standard broadcast (AM), frequency modulation (FM), television (TV) and other related services. The above increase in workload is believed understated because the FCC has additional workload responsibility in regulation of rates and practices of telephone, telegraph, and cable companies, safety and special uses of radio, and research and planning designed to improve utilization of radio spectrum.

SOURCE: U.S. Budget and Appendix, 1967-72.

Selected Bibliography

Selected Bibliography

The following list of articles, books, reports, and studies represents a collection of sources useful for understanding the regulatory process. The listing of this material in no way signals an endorsement of the views stated therein.

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